EDITOR'S NOTE

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o. 85-5915-CFX
tatus: GRANTED

Title: Brenda E. Wright, Geraldine H. Broughman and Sylvia P. Carter, Petitioners
v.
City of Roanoke Redevelopment and Housing Authority

ocketed:
ovember 25, 1985

Court: United States Court of Appeals for the Fourth Circuit

Counsel for petitioner: Woodward, Henry L.

Counsel for respondent: Harris, Bayard E.

ntry	Date	Note	Proceedings and Orders
1	Nov 25 1985	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
3	Dec 19 1985		Brief of respondent Roanoke Redevelopment, etc. in opposition filed.
4	Jan 2 1986		DISTRIBUTED. January 17, 1986
5	Jan 2 1986		Reply brief of petitioners Brenda E. Wright, et al. filed.
7	Jan 21 1986		Petition GRANTED.
			**********
9	Feb 10 1986		Order extending time to file brief of petitioner on the merits until March 26, 1986.
10	Feb 27 1986		Joint appendix filed.
11	Mar 21 1986		Brief of petitioners Brenda E. Wright, et al. filed.
12	Mar 24 1986		Record filed.
13	Mar 31 1986		Lodging received.
14	Mar 28 1986		Brief amicus curiae of National Housing Law Project filed.
16	Apr 3 1986		Order extending time to file brief of respondent on the merits until May 9, 1986.
17	Apr 9 1986		Record filed.
18	Apr 9 1986		Certified original record, 3 volumes, received.
19	May 9 1986		Brief of respondent Roanoke Redevelopment, etc. filed.
20	Jun 26 1986	D	Motion of National Association of Housing and Redevelopment Officials, et al. for leave to file a brief as amici curiae, out-of-time filed.
21	Jul 15 1986		CIRCULATED.
22	Jul 28 1986		SET FOR ARGUMENT. Monday, October 6, 1986. (3rd case) (1 hour).
23	Sep 3 1986		Motion of National Association of Housing and Redevelopment Officials, et al. for leave to file a brief as amici curiae, out-of-time DENIED.
24	Sep 26 1986	X	Reply brief of petitioners Brenda E. Wright, et al. filed.
25	Oct 6 1986		ARGUED.

No. 85-5915

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1985

BRENDA E. WRIGHT, GERALDINE H. BROUGHMAN, and SYLVIA P. CARTER individually and on behalf of all persons similarly situated

Petitioners

v.

CITY OF ROANOKE REDEVELOPMENT AND HOUSING AUTHORITY

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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No. _____

IN THE

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Respondent

QUESTIONS PRESENTED

1. Does 42 U.S.C. §1983 authorize private enforcement of a federal entitlement only if a right of action can also be implied from the underlying federal statute?

2. Did Congress, by vesting HUD with general regulatory authority in the United States Housing Act of 1937, intend to foreclose private enforcement of the Act pursuant to §1983?

3. Does the Brooke Amendment to the Housing Act of 1937 vest public housing tenants with substantive rights of the sort which can be enforced under §1983?

4. Must the federal courts entertain, under federal question and commerce clause jurisdiction, a right of action upon a tenant lease which unavoidably raises a substantial federal issue under the Housing Act of 1937 and implementing regulations?

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The opinion entered by the Court of Appeals for the Fourth Circuit in No. 85-1068 (August 26, 1985) is published at 771 F.2d 833 (4th Cir. 1985), and included in the appendix at A1. The opinion and judgment of the District Court are published at 605 F. Supp. 532 (W.D. Va. 1984), and included in the appendix at A 15 and A25.

JURISDICTION

The judgment of the Court of Appeals was entered on August 26, 1985, and this petition filed within 90 days thereafter. This Court has jurisdiction to review the judgment by writ of certiorari under 28 U.S.C. §1254(1).

STATUTES AND REGULATIONS INVOLVED

The following statutes and regulations central to the case are set forth in the appendix:

STATEMENT OF THE CASE AND INITIAL JURISDICTION

Petitioners are low-income tenants of public housing projects owned and operated by respondent City of Roanoke Redevelopment and Housing Authority ("the Authority"). They complain that the Authority has required its tenants to pay charges for electric utility service which are in violation of the rent limits imposed by Congress through the Brooke Amendment to the United States Housing Act of 1937, and implementing regulations of the United States Department of Housing and Urban Development (HUD).

The Authority's projects were built and are operated with subsidies under the Housing Act of 1937, 42 U.S.C. §1437 et seq. A critical portion of the Housing Act of 1937 is the Brooke Amendment, added in 1969, which limits the rent which can be charged low-income public housing tenants and subsidizes local public housing authorities ("PHAs") to cover the resulting deficit in operating costs. The relevant portion of the Brooke Amendment at 42 U.S.C. §1437a(a)(1) reads as follows:

> **(1) §1437a. Rental payments; definitions**
> (a) Dwelling units assisted under this Act shall be rented only to families who are lower income families at the time of their initial occupancy of such units. A family shall pay as rent for a dwelling unit assisted under this Act the highest of the following amounts, rounded to the nearest dollar:
> (1) 30 per centum of the family's monthly adjusted income....[1]

In the absence of careful definitions, PHAs could easily evade the Brooke Amendment limits by adding on a host of other charges for essential services to achieve the same effect as higher rents. To avoid this problem HUD has historically considered "rent" in the public housing program to include shelter cost plus a reasonable amount for utilities. See HUD Comment to proposed regulations, 49 Fed. Reg. 31400 (August 7, 1984). The net effect of HUD's regulatory scheme is that the percentage of income which a tenant is to pay a housing authority as rent includes a reasonable utility allowance. A housing authority can impose additional charges for "excessive" consumption. A charge for any part of a "reasonable utility allowance," however, violates the rent ceiling established by the Brooke Amendment. How, then, is a reasonable utility allowance to be calculated?

The answer was provided by HUD's regulations entitled

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[1]This is the present version of the Brooke Amendment, last amended by P.L. 97-35 effective 10/1/81. The previous version at §1437a(a) was worded differently and imposed a 25% rent limit. The change has no operative effect on this suit, since the Housing Authority has always maintained its rent levels at the highest percentage authorized.

"Tenant Allowances for Utilities," 24 C.F.R. §865.470-.482, promulgated at 45 Fed. Reg. 59505 (September 9, 1980) and effective for the period of this suit. The regulations imposed mandatory procedural and substantive requirements. Utility allowances were to be calculated on the basis of current consumption data (§865.476), subject to notice and tenant comment (§865.473), and revised whenever more than 25% of tenants in any category of units exceeded the allowances (§865.480(b)(1)). The allowances were to be set high enough so that they would meet the needs of 90% of the dwelling units of each type and size (§865.477).

The Housing Authority was duly notified of the regulation by HUD and encouraged to comply even before the January 28, 1981, deadline if possible. The Housing Authority did absolutely nothing to comply; it "deemed its existing procedures and allowances... as being in substantial compliance."[2] It did not make a recalculation on current usage, or review the data periodically to consider revisions. It did not offer an opportunity for tenant comment. It never attempted to meet the substantive standard of meeting the consumption needs of 90% of tenant families. Quite the contrary: it continued to surcharge almost all its tenants - 100% in some unit sizes - for excessive utility consumption. Over a two year portion of the period in question the Authority extracted $113,114.54 from 1100 tenant families in surcharges that were manifestly in defiance of the HUD regulations.

The tenants filed this suit against the Authority on December 8, 1982, in the District Court for the Western District of Virginia at Roanoke. Their complaint stated two claims: (1) a claim under 42 U.S.C. §1983 that the Authority was violating their rights under the Brooke Amendment and

[2]These facts are drawn from discovery responses which were made part of the record by the tenants' motion for partial summary judgment. While they have not been established by the courts below, they have not been put in genuine dispute by the Authority.

implementing regulations; and (2) a claim under the Authority's standard lease, paragraph 4 of which read:

> **Utilities:** Management Agent agrees to furnish at no charge to the Resident the following utilities as reasonably necessary: hot and cold water, gas for cooking, and electricity for lighting and general household appliances and heat at appropriate times of the year, and also range and refrigerator. Resident will be required to pay for all excess consumption of utilities above the monthly allocated amount as developed by the Authority and determined by the individual check meter servicing the lease unit. The schedule of allocations and charges for excess consumption is posted on the bulletin board of each Housing Development office. [Emphasis added].

The tenants sought injunctive relief and damages for themselves and a class.

Jurisdiction of the District Court was invoked under 28 U.S.C. §1331 (in that the claims raised federal questions under the Brooke Amendment and HUD regulations); 28 U.S.C. §1337 (in that the Brooke Amendment is an exercise of the power of Congress to regulate interstate commerce); and 28 U.S.C. §1343 (3) and (4) (in that the §1983 claim asserted a denial of civil rights). Pendant jurisdiction was pled over any state law issues.

A class was certified under R. 23(a), (b)(2) and (b)(3). A period of discovery and negotiation followed, and the Authority agreed to escrow the disputed surcharges. The Authority moved for judgment on the pleadings asserting that (1) tenants have no implied right of action to enforce the Brooke Amendment; (2) the Brooke Amendment creates no substantive rights enforceable through §1983; and (3) the tenants' failure to join HUD, an indispensable party, mandates dismissal. The tenants moved for partial summary judgment on their §1983 claim under the Brooke Amendment and regulations, and opposed the dismissal. While the motions were pending, HUD adopted new utilities regulations (24 C.F.R. §965.470, effective October 2, 1984) and the Authority revised its allowances effective January 2, 1985. The parties agree that the request for injunctive relief was mooted by this action, but the claim for recovery of past

improper charges through January 1, 1985, remained. The new regulations, while different in their procedural and substantive requirements, are similarly mandatory, so that the major legal issues on appeal will remain critically relevant.

The District Court treated the dismissal motion as one for summary judgment and dismissed the case. The District Court's opinion (A 15, 605 F.Supp. 532) accepted the invitation to find no implied right of action (A17-20) although the tenants had never urged that basis for their suit. The District Court then reasoned that if no right of action could be implied, no right enforceable under §1983 could exist (A23-24). Even if it did, then it was foreclosed from §1983 enforcement by Congress' grant of regulatory authority to HUD (A22-23). Finally, it dismissed the lease claim as a discretionary exercise of pendant jurisdiction over state law claims (A24, n. 9), despite the position of the tenants that the lease claim constituted an independent basis of federal question and commerce clause jurisdiction raising a substantial federal question.

On appeal the Court of Appeals for the Fourth Circuit affirmed. The opinion (A1, 771 F.2d 833) read that Court's previous decisions in Perry v. Housing Authority of the City of Charleston, 664 F.2d 1210 (1981) and Phelps v. Housing Authority of Woodruff, 742 F.2d 816 (1984) to say that Congress intended to foreclose private §1983 enforcement of any section of the Housing Act of 1937 (A9). Despite the attempt of a concurring judge to separate the framework of analysis (A10), the Court persisted in an implied right of action analysis under Cort v. Ash, 422 U.S. 66 (1975), characterizing that inquiry as "similar, if not perfectly congruent" to examination of §1983's exceptions (A8, n. 9). Finally, the Court upheld the dismissal of the lease claim as an exercise of discretion. Id.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW DIVESTS PUBLIC HOUSING TENANTS OF ANY MEANINGFUL FEDERAL RIGHTS AND PERMITS LOCAL DESTRUCTION OF THE ESSENTIAL CHARACTER OF THE LOW INCOME HOUSING PROGRAM.

Nationwide there are 1,270,761 units of public housing owned by 3,031 local public housing authorities[3] with over 3 million tenants in residence. This massive housing effort is a cooperative venture of local authorities with the federal government within the framework of the United States Housing Act of 1937, its subsequent amendments, and implementing regulations of the federal Department of Housing and Urban Development. Although management responsibility of PHAs is accompanied by some discretion, there are specific and mandatory requirements pertaining to the rights of tenants: for instance, lease provisions, grievance hearings, and - central to this case - limitations on rents and charges that can be imposed on tenants.

From its passage in 1969, the Brooke Amendment to the Housing Act of 1937 has limited the percentage of tenant income which can be charged as rent by a PHA; and in a companion funding provision, subsidized PHA operating costs to make the limitation feasible. Prior to the Brooke Amendment, and notwithstanding the general regulatory authority of HUD, "the neediest families were excluded from the public housing program," S. Rep No. 91-392, 91st Cong.; 1st Sess. (1969), reprinted in [1969] U.S. Code Cong. and Admin. News 1524, 1542. Recognizing that the cost of operating and maintaining public housing would be "too high for the very poor to bear," id., Congress authorized HUD (present 42 U.S.C. §1437g) to pay PHAs the difference between the costs of operation and the amounts collected as rent under the percentage ceiling. This combination of stick and

[3] HUD FY1986 Congressional Budget Justification, Exhibit to hearings before a Subcommittee of the Committee on Appropriations, House of Representatives, 99th Congress 1st Session, on "Dept. of HUD - Independent - Agencies appropriations for 1986," Part V, p. 231 (March 1985).

carrot has been fairly described as "the essential feature" and "the backbone" of the public housing program, Howard v. Pierce, 738 F.2d 722, 728, 730 (6th Cir. 1984).

The Brooke Amendment provides no explicit private judicial or administrative remedy for its enforcement, nor does it preclude any. HUD, while having a general responsibility to enforce federal requirements affecting PHAs, has not asserted exclusive enforcement authority,[4] nor has it provided any mechanism for tenants to invoke HUD's enforcement authority regarding Brooke violation. In comments on the 1984 revision of the utilities regulations, for instance, HUD disclaimed authority or intention to preclude tenant challenge to PHA utility allowances in state or federal court, 49 Fed. Reg. 31403 (August 7, 1984). The same comments note that tenants may not challenge the utility allowances through the administrative grievance process, 49 Fed. Reg. 31407. HUD itself has repeatedly taken the litigation position that it has neither the authority nor the capacity to protect tenants' interests by enforcing the Brooke Amendment.[5] In fact, HUD's enforcement posture is so relaxed that the Brooke limits are not even mentioned in the standard annual contributions contract entered with PHAs.

Despite the centrality of the Brooke Amendment to the public housing effort, its "unmistakeable focus" upon low income tenants, Howard v. Pierce, 738 F.2d at 726, and the limited

[4]The Fourth Circuit's aside that HUD "declined to intervene" in the present dispute because of its "intricate sifting and weighing process" (A6-7, n. 7) is the sheerest speculation. The tenants noted at argument that they had received no response whatsoever to their complaint to HUD. This certainly reflects no affirmative decision on HUD's part. Although HUD would not need to do any "intricate sifting and weighing" to see that the Authority had completely disregarded the utilities regulations, the more probable hypothesis is bureaucratic inertia.

[5]See e.g., Stone v. District of Columbia, No. 83-199 (D.C. Cir.) brief filed February 10, 1984 for Federal appellees Pierce and White, pp. 39-41; Brown v. Housing Authority of McCrae, No. 85-8186 (11th Cir.) brief filed July 15, 1985 for Samuel R. Pierce, Jr., Sect'y. of HUD, pp. 22-23.

discretion or interest of HUD, the Court of Appeals for the Fourth Circuit has now decided that only HUD, and not those tenants, may enforce the Amendment against a PHA which has been in clear and uncontested violation for years. The Fourth Circuit reached this result without any analysis of the Brooke Amendment or reference to its legislative history; without a shred of statutory language showing a Congressional intent to exclude private enforcement; and with no evidence of any administrative mechanism for tenants to raise the question with HUD. While purporting to apply established exceptions to §1983 liability, the decision below so muddles the analysis that the exceptions become unrecognizable (see II below). The result, however, is clear enough: tenant families may not sue the Authority to enforce the Brooke limitations no matter how thoroughly the "essential character" of public housing as established by Congress has been perverted by the Authority.

This result would be devastating enough were it limited to the Brooke Amendment. By unexplained expansion of its earlier decisions under the Housing Act of 1937, the Court of Appeals has decided that no federal tenant rights may be enforced by a public housing tenant under §1983 ("... a characteristic of the §1437 right is precisely that the plaintiffs are not to have the authority themselves to sue," A7). This means that not only Brooke Amendment rent limits, but also grievance mechanisms mandated by Congress (42 U.S.C. §1437d(k)) and lease provisions considered essential by Congress (42 U.S.C. §1437d(l)) are to be unenforceable by their sole or chief beneficiaries. As the facts of this case demonstrate, in the absence of a private enforcement mechanism there can no longer be any meaningful federal rights of public housing tenants.

Where there is a manifest Congressional intention to assure those tenants certain federal rights - and particularly where the rights are so critical to the very purpose of public housing - the federal courts should not so quickly abdicate their enforcement role to an administrative agency which spurns

the task. The decision below thoroughly merits this Court's review.

II. THE DECISION BELOW REDUCES THE AVAILABILITY OF THE §1983 REMEDY TO CASES WHERE A PRIVATE RIGHT OF ACTION CAN BE IMPLIED FROM A FEDERAL STATUTE.

The tenants in this action relied upon 42 U.S.C. §1983 to enforce their Brooke Amendment rights, under authority of Maine v. Thiboutot, 448 U.S. 1 (1980). Thiboutot recognized that while §1983 vests no substantive rights, it may be invoked to redress violations of federal law under color of state law. One recognized exception to this general rule was stated in Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 28 (1981) (to be enforceable through §1983, the federal law in question must create substantive rights, privileges or immunities to be enforced - mere hortatory language in a statute does not). A second exception was noted in Middlesex City Sewage Auth. v. Nat'l Sea Clammers Ass'n., 453 U.S. 1, 20 (1981) ("When the remedial devices provided in a particular Act are sufficiently comprehensive, they may suffice to demonstrate Congressional intent to preclude the remedy of suits under §1983"). These exceptions are straightforward and relatively narrow because "we should not lightly conclude that Congress intended to preclude reliance on section 1983," Smith v. Robinson, 468 U.S. _____, 104 S.Ct. 3457, 3459 (1984).

Neither of the exceptions to §1983 fits well in this case. The short of it is that the Pennhurst test (are there rights?) is well met by the strong entitlement language of the Brooke Amendment itself and the mandatory specifics of the utility regulations. The Sea Clammers test (is §1983 precluded by an alternative remedial scheme?) is well met by the absence of any statutory or administrative tenant remedy for PHA misconduct of this sort. The Court of Appeals forced a contrary solution only by shading its analysis into the tests for deciding whether courts should imply a cause of action from a federal statute, under Cort v. Ash, 422 U.S. 66 (1975). If

left to stand, the Fourth Circuit's opinion will not only muddle future applications of Cort v. Ash, Pennhurst, and Sea Clammers, but will essentially reduce the §1983 remedy for violations of federal law to those cases where it is not needed - where a right of action could be implied directly from the statute without use of §1983. This result essentially overrules Thiboutot.

This confusion is most evident in the opinion of the District Court, which read one of the Fourth Circuit's previous treatments of this issue to hold explicitly that no cause of action will lie under §1983 where no right of action may be implied from the substantive statute. A23-24, citing Home Health Services v. Currie, 706 F.2d 497, 498 (4th Cir. 1983). The Fourth Circuit opinion perpetuates this error in at least two respects. First, the panel persists in making a Cort v. Ash analysis (A8-9) although plaintiffs have consistently disclaimed any reliance on that approach. The analysis is nonetheless offered to render their disposition "more complete," id., as in Home Health Services, 706 F.2d at 498 and Phelps v. Housing Authority of Woodruff, 742 F.2d at 822, n. 10. In fact, such advisory opinions only confuse the issue, as the District Court's opinion demonstrates.

Second, the Fourth Circuit continues to minimize the difference between the implied rights analysis and the review of §1983 exceptions. "The inquiry under either interpretation of the appellant's position is similar, though not perfectly congruent." A9, quoting Phelps, supra. Even the concurring opinion, which tries to restore some distinction to the two analytic frameworks, emphasizes instead their similarity: "distinctions exist, however fine" (A11); "in many instances this would be a distinction without a difference" (A11); "the two are distinct, however subtly" (A14).

There are, of course, some parallels. Both Pennhurst and Cort v. Ash require a determination of whether a statute creates substantive rights in the plaintiffs. Both Sea Clammers

and Cort v. Ash require inquiry into Congressional intent to permit or preclude remedies. But in this case, as in very many cases, Congress has not explicitly spoken on the subject of private remedies. In that context, Sea Clammers and Cort v. Ash should produce dramatically different results. Unless there is an alternative private remedy in the statutory scheme, Sea Clammers would permit the customary private enforcement by §1983. A majority of this Court have characterized this as a "presumption that a federal statute creating federal rights may be enforced in a §1983 action."[6] Not so under Cort v. Ash, where absence of explicit Congressional intent simply moves the inquiry to other factors, with the burden upon the proponent of the implied right. Cannon v. University of Chicago, 441 U.S. at 677, 688 (1979). These are critical, not subtle, differences. Failure to recognize them inevitably has the effect, as in this case, of reducing the time-honored remedy of §1983 to a seldom-available redundancy. This is error demanding this Court's correction.

III. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THE SECOND, THIRD, SIXTH AND D.C. CIRCUITS CONCERNING THE AVAILABILITY OF §1983 TO ENFORCE FEDERAL HOUSING RIGHTS.

This decision of the Fourth Circuit holding §1983 to be unavailable for private enforcement of the Housing Act of 1937 is in conflict with at least four recent decisions of other circuits.

In Beckham v. New York City Housing Authority, 755 F.2d 1074 (2d Cir. 1984) the Second Circuit specifically held that public housing tenants could sue a housing authority under §1983 to enforce the Brooke Amendment. 755 F.2d at 1076-77. In examining the question of whether enforceable rights exist,

[6] Pennhurst, supra, 451 U.S. at 51 (White, Brennan and Marshall J.J., dissenting); Sea Clammers, supra, 453 U.S. at 27, A-11 (Stevens and Blackman, J.J., concurring in part and dissenting in part). See Boatowners and Tenants Ass'n. v. Port of Seattle, 716 F.2d 669, 674 (9th Cir. 1983).

the court found that "the rent limits set forth in the Brooke Amendment ... stand in sharp contrast to the funding statute interpreted in Pennhurst," id. at 1077, so that Brooke does create an enforceable right. Under the Sea Clammers test, the court found that the Brooke Amendment contained no comprehensive enforcement mechanism to enforce statutory rent limitations, in contrast to the elaborate remedial devices which showed a Congressional intent to foreclose the §1983 remedy in Sea Clammers. The Second Circuit's Beckham decision was urged below in this case, and the Fourth Circuit recognized the conflict; in a footnote (A10) that court simply asserted that Beckham must yield to the Fourth Circuit's own decisions.

The thorough decision of the District of Columbia Circuit in Samuels v. District of Columbia, 770 F.2d 184 (D.C. Cir., 1985) was brought to the attention of the Fourth Circuit after oral argument, but not discussed in the opinion despite an obvious conflict. The plaintiff public housing tenants in Samuels sued the District and its housing officials under §1983 to enforce another provision of the Housing Act of 1937, 42 U.S.C. §1437d(k) (requiring PHAs to maintain an administrative grievance procedure). The D.C. Circuit, like the Second Circuit in Beckham, found that the Housing Act of 1937 did not expressly establish or exclude any administrative or judicial remedy for violations of the grievance procedure requirement (770 F.2d at 196). The Samuels tenants also met the Pennhurst test for enforceable rights because Congress had explicitly mandated local PHAs to act in accordance with particular statutory standards (id. at 196-97). The HUD regulations on the subject were equally mandatory. While the Brooke Amendment in the present case is a separate provision from the grievance procedure requirement, the two provisions are similarly mandatory in their language and mutually lacking in statutory enforcement vehicles; they are both part of the Housing Act of 1937, and the Fourth Circuit's decision is in direct conflict as to the availability of §1983.

Also irreconciliable is the decision of the Sixth Circuit in Howard v. Pierce, 738 F.2d 722 (6th Cir. 1984). That tenant suit against HUD and local PHA did not rely on §1983; tenants rather sought to imply a right of action directly from the Brooke Amendment, an exercise that requires a substantially more affirmative demonstration of Congressional intent. After an intensive review of the function and legislative history of the Brooke Amendment, the court concluded that the Amendment places an "unmistakable focus" upon low income tenants, 738 F.2d at 726, and that implication of a private right of action against HUD was consistent with the lack of any private enforcement mechanism or explicit denial thereof, id. at 727-28. While in a different analytic framework from the Fourth Circuit's decision, this reasoning is flatly contradictory.

The Fourth Circuit's disposition of this case is also inconsistent, although less directly, with the Third Circuit's recent holding in Pietroniro v. Borough of Oceanport, 746 F.2d 976 (3d Cir. 1985). That court applied the Sea Clammers test to determine whether a business owner displaced by urban renewal was foreclosed from a §1983 suit to enforce federal relocation assistance remedies. Those remedies were available under the Housing Act of 1949 and related sources rather than the Housing Act of 1937, as in this case. The housing acts are similar, however, in the absence of any statutory scheme for private enforcement or comprehensive regulatory enforcement scheme; neither has a "mechanism by which the federal administrative enforcement authority charged with enforcing these conditions [on the state - HUD - can appropriately investigate and respond to the claims raised by persons in... [the position of the claimants]." 764 F.2d at 980. In finding §1983 an appropriate vehicle, Pietroniro rests upon a premise irreconcilable with the Fourth Circuit's position in this case.

Finally, the Court should be aware of two pending cases in the Eleventh Circuit. Brown v. Housing Authority of McRea, No. 85-8186; Nelson v. Greater Gadsden Housing Authority, No. 85-

7320. The availability of §1983 as a private remedy for Brooke Amendment utility violations is in issue in these appeals. Any decision on the merits will add to the conflict of authority on the question.

IV. THE DECISION BELOW REDUCES A SUBSTANTIAL PART OF FEDERAL QUESTION AND COMMERCE CLAUSE CASES TO DISCRETIONARY PENDANT JURISDICTION.

As their second claim in this case, the tenants asserted that the Authority's failure to provide adequate utility allowances violated the Authority's promise under paragraph 4 of the Authority's standard lease (p. 5 supra) to furnish electrical utilities service reasonably necessary for lighting and general household appliances. The District Court viewed this claim solely as an invocation of pendant jurisdiction, and in a footnote (A25, n. 9) dismissed the claim as a pendant state claim over which it had the discretion articulated in United Mine Workers v. Gibbs, 383 U.S. 715 (1966). The Court of Appeals affirmed this holding (A10). The sole inquiry of the court on this issue was whether the lease created a landlord-tenant relationship recognized in state law (A6). If so, then any suit was to be relegated to state court.[7]

This Court has recently formulated the federal question test in Franchise Tax Bd. of California v. Construction Laborers' Vacation Trust for Southern California, 463 U.S. 1, 13, (1983) as follows:

> Even though state law creates appellant's causes of action, its case might still "arise under" the laws of the United States if a well-pleaded complaint established that its right to relief under state law requires resolution of a substantial question of federal law in dispute between the parties.

Although the tenants' right to sue on their lease in this

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[7]The present tenants, of course, do not argue that all public housing lease questions arise under federal law; only that each case must be examined on its merits. Petitioners have no quarrel, for instance, with the Fourth Circuit's refusal to hear the lease claim in Perry v. Housing Authority of City of Charleston, supra, 664 F.2d at 1217-18.

case arises from state law, the substantive merits of the claim as pled in the complaint unavoidably include the federal issue. The meaning of "utilities... as reasonably necessary" cannot be legitimately determined apart from HUD's utilities regulations and the Brooke Amendment. It makes no sense to say that only a state court may decide questions of federal law so critical to the public housing program. Thus the District Court had independent bases in both §1331 and §1337 for jurisdiction over the lease claim, however it disposed of the §1983 claim. The rejection below of these mandatory grounds of jurisdiction was not only incorrect, but has striking implications.

The reasonable reading of the Fourth Circuit's decision is that it will accept federal question jurisdiction only if both the remedy - the cause of action - and the right are federal in nature. This result not only flies in the face of the Franchise Tax Board formulation, but also reduces to discretionary pendant jurisdiction, or excludes entirely from federal court, that substantial portion of contract cases where only the substantive right arises under federal law. Such cases have been properly within federal question jurisdiction as least since Smith v. Kansas City Title & Trust Co., 255 U.S. 180, 199-201 (1921). See generally 13 WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE (1984) §3562, 41-48. Such a dramatic change in the business of the federal courts may not properly be accomplished without this Court's considered review.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of this Petition for a Writ of Certiorari was served by deposit in the United States mail, first class postage prepaid, addressed to Bayard E. Harris, Esq., counsel for respondent, Woods, Rogers & Hazelgrove, P. O. Box 720, Roanoke, Virginia 24004, on November 19, 1985.

Henry L. Woodward

Of Counsel for petitioners

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-1068

Brenda E. Wright; Geraldine H. Broughman; Sylvia P. Carter; individually and on behalf of all persons similarly situated,

Appellants,

versus

City of Roanoke Redevelopment and Housing Authority,

Appellee.

Appeal from the United States District Court for the Western District of Virginia, at Roanoke. James C. Turk, Chief Judge. (CA 82-908)

Argued: June 6, 1985 Decided: August 26, 1985

Before WIDENER and MURNAGHAN, Circuit Judges, and GORDON, Senior United States District Judge for the Middle District of North Carolina, sitting by designation.

Henry L. Woodward (Renae Reed Patrick; Legal Aid Society of Roanoke Valley on brief) for Appellants; Bayard E. Harris (Woods, Rogers & Hazelgrove on brief) for Appellee.

MURNAGHAN, Circuit Judge:

Tenants of public low-cost housing brought an action against their landlord, the Roanoke Redevelopment and Housing Authority ("RRHA"). Their complaint was based on the alleged deprivation of the tenants' rights under the Brooke Amendment of the United States Housing Act of 1937, 42 U.S.C. § 1437(a),[1] and particular United States Housing and Urban Development ("HUD") regulations pertaining to utility allowances issued pursuant to that statute. Specifically, the tenant class alleged that the RRHA disregarded HUD regulations governing the establishment of "reasonable" electric utility allowances and the periodic revision of unreasonably low allowances. Thus, the tenants claimed that they were wrongfully overcharged for electrical consumption in excess of their designated allotments.[2]

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1 § 1437a. Rental payments

(a) Families included; amount

Dwelling units assisted under this chapter shall be rented only to families who are lower income families at the time of their initial occupancy of such units. Reviews of family income shall be made at least annually. A family shall pay as rent for a dwelling unit assisted under this chapter (other than a family assisted under section 1437f(o) of this title) the highest of the following amounts, rounded to the nearest dollar:

(1) 30 per centum of the family's monthly adjusted income;
(2) 10 per centum of the family's monthly income; or
(3) if the family is receiving payments for welfare assistance from a public agency and a part of such payments, adjusted in accordance with the family's actual housing costs, is specifically designated by such agency to meet the family's housing costs, the portion of such payments which is so designated.

2 The appellants brought a second claim grounded on an alleged violation of a provision in the standard lease issued by RRHA. According to the tenants, RRHA's failure to furnish electrical utilities service reasonably necessary for lighting and general household appliances at no charge violated its obligation to tenants under Paragraph 4 of their standard lease. Paragraph 4 of the standard lease (Continued)

First, we must consider the correctness of the route which the plaintiffs sought to follow in their quest for injunctive and monetary relief,[3] namely, 42 U.S.C. § 1983.[4] It is now widely recognized that 42 U.S.C. § 1983 may be invoked to redress certain violations of federal statutory law by state actors. Maine v. Thiboutot 448 U.S. 1 (1980). Not all violations of federal law, however, give rise to § 1983 actions. In order to determine whether a violation of a particular federal statute constitutes a basis for § 1983 liability, a court must make two

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provides:

> **Utilities:** Management Agent agrees to furnish at no charge to the Resident the following utilities as reasonably necessary: hot and cold water, gas for cooking, and electricity for lighting and general household appliances and heat at appropriate times of the year, and also range and refrigerator. Resident will be required to pay for all excess consumption of utilities above the monthly allocated amount as developed by the Authority and determined by the individual check meter servicing the leased unit. The schedule of allocations and charges for excess consumption is posted on the bulletin board of each Housing Development office.

(Emphasis added).

3 The appellants initially sought injunctive relief requiring the RRHA to comply with the Brooke Amendment and federal regulations and a refund for all surcharges collected in violation of said law and regulations.

On appeal, however, the appellants stated that newly issued HUD regulations, 24 C.F.R. § 965.470-480 (1985) mooted their claim for injunctive relief and that only their claim for damages remained viable.

4 **§ 1983. Civil action for deprivation of rights**

> Every person who, under color of any statute ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

inquiries: 1) whether Congress had foreclosed private enforcement of the pertinent statute in the enactment itself, and 2) whether the statute at issue was the kind that created enforceable "rights" under § 1983. Middlesex County Sewerage Authority v. National Sea Clammers Association, 453 U.S. 1, 19 (1981); Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 28 (1981).[5]

We have recently ruled that violations of the Housing Act of 1937 do not give rise to a § 1983 cause of action. See Perry v. Housing Authority of City of Charleston, 664 F.2d 1210, 1217-1218 (1981); Phelps v. Housing Authority of Woodruff 742 F.2d 816, 820-822 (1984). In Perry, low income tenants brought an action for declaratory and injunctive relief and damages against the local housing authority. The tenants based their action on 42 U.S.C. § 1437[6] and on 42 U.S.C. § 1983. The tenants claimed that the landlord failed to keep the premises safe and clean as required by 42 U.S.C. § 1437. We ruled that although

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5 In other words, the right asserted must itself be created in such other federal statute, for 42 U.S.C. § 1983 provides only a remedy and does not itself create rights. See, e.g., Miener v. State of Missouri, 673 F.2d 969, 976 n.6 (8th Cir. 1982), cert denied, 459 U.S. 909, 916 (1982) ("Section 1983 is remedial in nature, and does not in itself provide for any rights, substantive or otherwise."); Birnbaum v. Trussell, 371 F.2d 672, 676 (2d Cir. 1966) ("Sec. 1983 . . . should be interpreted with sufficient liberality to fulfill its purpose of providing a federal remedy in a federal court in protection of a federal right.").

6 **§ 1437. Declaration of policy**

> It is the policy of the United States to promote the general welfare of the Nation by employing its funds and credit, as provided in this chapter, to assist the several States and their political subdivisions to remedy the unsafe and unsanitary housing conditions and the acute shortage of decent, safe, and sanitary dwellings for families of lower income and, consistent with the objectives of this chapter, to vest in local public housing agencies the maximum amount of responsibility in the administration of their housing programs. No person should be barred from serving on the board of directors or similar governing body of a local public housing agency because of his tenancy in a lower income housing project.

the tenants were intended beneficiaries of the Act, the benefit was not without limits. It did not include the right to sue for what Congress had conferred. That is to say, there was no implied private right of action under § 1437. "[T]he legislative history indicates no intention to create in the Housing Act a federal remedy in favor of tenants but does indicate quite clearly the intention to place control of and responsibility for these housing projects in the local Housing Authorities." Perry, supra, at 1213. We also rejected the tenants' argument that they had a cause of action pursuant to 42 U.S.C. § 1983 since the tenants had failed to indicate "any substantive provisions of the various housing acts which [gave] them a tangible right, privilege, or immunity." Id. at 1217. While we acknowledged that "the Act was designed to help low income families" we emphasized that "the actual assistance went not to the tenants, but to the states." Id. We therefore concluded that § 1437 did "not create any legally cognizable rights in tenants of programs funded under the housing statutes." Id. We noted though that our disposition of the tenants' § 1437 and § 1983 claims did not deprive the tenants of a remedy. "The lease between the plaintiffs and [the local housing authority] creates a landlord-tenant relationship. Plaintiff's rights are based on this lease and their remedy, if any, lies in the [State] courts." Id. at 1217-1218, n.15.

In Phelps, tenants challenged the legality of the local housing authority's policies regarding the admission of new tenants. The tenants claimed that such policies deprived them of their "right" to be selected under the tenant preference provisions outlined in the Act and that therefore they had a cause of action pursuant to § 1983. In evaluating the viability of the § 1983 action in light of Middlesex and Pennhurst, supra, we first considered whether Congress foreclosed private enforcement of the Housing Act in the enactment itself. On that score, we concluded:

> [A]lthough [the statutory sections in question] clearly manifest Congressional intent to benefit generally applicants who are involuntarily displaced or who occupy substandard housing, its chosen means of accomplishing that end is plainly that HUD, rather than private litigants, is to be the enforcer of the statutory directive. Apart from the obvious lack of any affirmative statutory language indicating a Congressional intention to allow private remedial suits, the statute is replete with indications of an intention to entrust HUD with the means and the responsibility for effective enforcement. The statutory scheme requires the Secretary to include in all Annual Contributions Contracts a requirement that public housing authorities adopt tenant selection criteria which include express preferences and a requirement that eligible applicants be notified of expected occupancy dates "insofar as . . . can be reasonably determined." Under the statute the Secretary performs extensive audits to verify the authorities' compliance with the conditions of the ACC, and HUD is authorized, as contract promisee, to enforce compliance by the most drastic possible means: termination of the federal subsidies under the contract. In sum, the whole of the legislative scheme, we think, indicates Congress's intention that HUD should continue to enforce required conditions by means of asserting its rights under the ACC, thereby intending "to foreclose private enforcement" of the requirements of the Housing Act.

Phelps, supra, 742 F.2d at 821 (emphasis added). In sum, the situation is very analogous to the one in which a trustee, not the cestui que trust, must bring suit. See, e.g., In Re Romano, 426 F. Supp. 1123, 1128 (N.D. Ill. 1977), modified, 618 F.2d 109 (1980) ("trustee is the only party who can sue a tenant for back rent even if the beneficiary has the right to the land's proceeds").[7]

As to the second Middlesex inquiry, i.e., whether the rights allegedly conferred by the preference and notice provisions were the kind of "rights" enforceable under § 1983, we

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7 It was not an act of caprice on the part of Congress to designate HUD the "enforcer" of the Housing Act. Rather, consolidating enforcement of the Act in a single governmental body was a practical legislative attempt to protect the limited resources available to the government. In other words, HUD can act as a screening body and focus its attention on those housing developments sorely needing attention without risking the depletion of funds available for redressing violations of the Housing Act.

It should be noted that, in the instant case, the tenants stated at oral argument that they asked HUD to confront RRHA with its alleged violations of the Brooke Amendment. Ac-

concluded that no such "rights" were involved. Phelps, supra, 742 F.2d at 821-822. We ruled that it was highly unlikely that Congress intended federal courts to "make the necessary balancing of inevitably conflicting interests as between different applicants and possibly opposing statutory purposes that would be required to adjudicate individual claims of right." Id. at 822. Likewise, in the instant case, we consider it highly unlikely that Congress intended federal courts to make the necessary computations regarding utility allowances that would be required to adjudicate individual claims of right.

To conclude, the plaintiffs under 42 U.S.C. § 1437(a) have certain rights but the remedy to enforce them is not conferred on them. Under 42 U.S.C. § 1983, conversely, the statute itself creates no right, but for rights elsewhere created of a certain character the statute provides a remedy. It will not suffice, however, simply to put the § 1437 right and the § 1983 remedy together to enable the case the plaintiffs assert to proceed. The § 1437 right is simply incompatible with the § 1983 remedy, for a characteristic of the § 1437 right is precisely that the plaintiffs are not to have the authority themselves to sue. HUD alone may, as quasi trustee, take legal action, for the right is explicitly tailored not to allow the beneficiaries, the low cost housing tenants, to do so.[8]

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cording to the tenants, HUD declined to intervene. HUD's decision presumably reflected an intricate economic "sifting and weighing" process in which it assessed the utility of proceeding further on the tenants' behalf. Since the tenants chose not to join HUD as a defendant, we need not look behind HUD's decision in order to determine whether it breached any duty--perhaps that of a "trustee" owed to low-cost housing tenants under the Act. Cf. Howard v. Pierce, 738 F.2d 722, 730 (6th Cir. 1984).

8 The tenants rely on McGhee v. Housing Authority of City of Lanett, 543 F. Supp. 607 (M.D. Ala. 1982) to support the proposition that a violation of the Brooke Amendment gives rise to a § 1983 cause of action. Such reliance is misplaced. In McGhee, a public housing tenant brought an action against public housing authorities for setting rent in excess of 1/4 of her income in violation of the Brooke Amendment. The tenant asserted a cause of action under both

(Continued)

Thus, in light of Perry and Phelps, supra, the action of the district judge in granting summary judgment in favor of the RRHA on the § 1983 action and in dismissing the claim based on the lease without prejudice to pursuit by the plaintiffs of any state court cause of action which they may be entitled to assert is affirmed.[9]

AFFIRMED.

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§ 1437(a) and § 1983. The district court held that no private right of action existed under the Brooke Amendment but that the tenant had a cause of action under § 1983. The court's analysis pertaining to the existence of a § 1983 claim was, however, by no means exhaustive. The district court, in concluding that a § 1983 action existed, merely cited Maine v. Thiboutot, 448 U.S. 1 (1980), for the proposition that "§ 1983 encompasses claims based on purely statutory violations of federal law" without engaging in the more detailed inquiry prescribed in Middlesex, supra. Thus, based on the district court's reasoning, any time a plaintiff could assert a violation of federal law, (s)he could establish a § 1983 cause of action regardless of whether Congress foreclosed private enforcement of the particular statute or whether the statute at issue failed to create the type of "rights" enforceable under § 1983. Maine v. Thiboutot, however, concerned a federally established right to social security benefits which clearly was enforceable by private action in a state court. That, of course, is very different a) from Brooke Amendment benefits which, for reasons already advanced, are not enforceable by private action and b) from rights to bring state court actions under state landlord and tenant law.

As for Beckham v. New York City Housing Authority, 755 F.2d 1074 (2d Cir. 1985), it must yield to the authority of Perry and Phelps, supra, from our own circuit.

9 We have also considered whether the statute relied on, namely, the Brooke Amendment of the United States Housing Act of 1937, 42 U.S.C. § 1437(a), created rights of the type which plaintiffs here assert. See Cort v. Ash, 422 U.S. 66 (1975). The tenants in the instant case never asserted a cause of action under the Brooke Amendment but rather limited their claim to § 1983. However, given the close nexus between implying a cause of action under a federal statute and asserting a § 1983 claim, we address the former in order to render our disposition of the case more "complete." See Phelps v. Housing Authority of Woodruff, 742 F.2d 816, 822, n.10 (4th Cir. 1984):

> Appellants argue that the district court erred in holding that 42 U.S.C. § 1437d(c)(4)(A) and 42 U.S.C. § 1437d(c)(3)(ii) do not give rise to implied private causes of action. It is somewhat unclear whether they make this argument only in response to the district court's holding that in order for a violation of a federal statute to be actionable under § 1983, that statute must be of such a quality

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that in essence it gives rise to such an implied action, or whether they suggest that they had asserted such a separate private right of action that was erroneously denied.

As both the complaint and the court's opinion are cast in § 1983 terms, we consider the former interpretation more plausible. The inquiry under either interpretation of the appellant's position is similar, though not perfectly congruent. Nevertheless, lest our disposition of the case seem incomplete, we reject plaintiffs' implied private cause of action argument on the reasoning of Perry v. Housing Authority, 664 F.2d 1210 (4th Cir. 1981).

(Emphasis added).

Review of the statutory language of the Brooke Amendment reveals no provisions creating a right on the part of individual tenants to assert infractions of the sort claimed here. The existence of such a right is essentially negatived by the provisions of the annual contributions contract, a standardized form employed by HUD in this case. By Section 508 the annual contributions contract provides that HUD has "the right . . . to maintain any and all actions at law or in equity against the local authority to enforce the correction of any . . . default or to enjoin any . . . default or breach." The implication to be drawn from that language runs counter to the claim that the plaintiffs have enforceable rights under the Brooke Amendment.

GORDON, Senior District Judge, Concurring:

I concur in the analysis and the result of the panel's opinion. I write this brief concurrence to emphasize and, I hope, to clarify a point upon which the precedent has become a bit unclear, and which I found troubling. In considering the briefs, oral arguments, and the district court's decision in this case, it became apparent that the proper §1983 analysis has become mistakenly entangled with the analysis for an implied private right of action. While the two analyses are closely related, they are separate and distinct. My purpose is to disentangle them.

As discussed in the panel's opinion, Perry v. Housing Authority of Charleston, 664 F.2d 1210 (4th Cir. 1981), and Phelps v. Housing Authority of Woodruff, 742 F.2d 816 (4th Cir. 1984), are the controlling precedent on the issue presented in this case, that is, whether a §1983 cause of action exists to enforce the Brooke Amendment to the Housing Act of 1937. In each case, this court applied the standards set forth in Pennhurst State School and Hospital v. Halderman, 451 U.S. 1 (1981), and Middlesex City Sewage Authority v. National Sea Clammers Association, 453 U.S. 1 (1981), for determining whether §1983 enforcement of a statutory violation was proper. See Maine v. Thiboutot, 448 U.S. 1 (1980). The dual tests for §1983 enforcement are 1) whether Congress, in enacting the statute and its enforcement scheme, had foreclosed a private remedy, and 2) whether the statute created enforceable "rights, privileges, or immunities" under §1983. Middlesex, 453 U.S. at 19; Pennhurst, 451 U.S. at 28, n. 21.

In Perry the aggrieved tenants sought relief under §1983 and also alleged a private right of action under the Housing Act of 1937 (Act). The Perry court began its analysis by determining whether the tenants had a private right of action under the Act.

To do this, the court applied the test of Cort v. Ash, 422 U.S. 66 (1975):

> First, is the plaintiff "one of the class for whose especial benefit the statute was enacted" . . . that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? . . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? . . . And [fourth], is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal laws?

Perry, 664 F.2d at 1211-12 (quoting Cort v. Ash, 422 U.S. at 78).

It is clear that many of the elements that a court must consider in applying Cort v. Ash would also be relevant in determining whether a §1983 action was proper under Middlesex and Pennhurst. Both tests hinge on whether "rights" were created in the prospective plaintiffs and whether Congress intended private enforcement by the respective procedure. Distinctions exist, though, however fine. For instance, Cort v. Ash instructs us to consider whether there is "any indication of legislative intent . . . either to create [a private] remedy or to deny one," and to ask whether it would be consistent with the underlying purpose to imply one, 422 U.S. at 78; Middlesex commands that we ask "whether Congress had foreclosed private enforcement of that statute in the enactment itself." 453 U.S. at 19. Under the former, we must find an intention to imply a remedy before granting one; under the latter, if there is a "right," we assume that private enforcement is permissible absent some clear indication to the contrary. While in many instances this would be a distinction without a difference, it did not prevent the Supreme Court in Middlesex from addressing the questions separately.[1]

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1. The Court was faced with whether a private right of action existed to enforce certain federal pollution control and environmental protection acts. The Court stated that "both the structure of the Acts and their legislative history lead us to conclude that Congress intended that private remedies in addition to those expressly provided should not be implied." 453 U.S. at 18 (applying Cort v. Ash). The Court then applied the test for §1983 and, based on these same factors, concluded that "the existence of . . . express remedies [in the statutes] demonstrate not only that Congress intended to foreclose implied private actions but also that it intended to supplant any remedy that otherwise would be available under §1983." Id. at 21.

The Perry court first addressed whether the tenants could pursue a private right of action under the Act, and applied Cort v. Ash. Because the sections of the Act relied on by the plaintiffs in Perry were merely broad policy provisions, and because HUD was the intended enforcer of the Act, the court concluded that there were no "rights" created and no intent to imply a private remedy. The court therefore refused to imply a private right of action. Turning to whether the tenants could sue under §1983, the Perry court focused on the second prong of the Middlesex test: whether the statute created privately enforceable "rights." Based partly on the same factors the court had considered in its Cort v. Ash discussion, the Perry court concluded that the Act "does not create any legally cognizable rights in tenants of programs funded under the housing statutes." 664 F.2d at 1217. Because it had answered this inquiry in the negative, the court never reached the issue of legislative intent to foreclose §1983 enforcement.

Subsequently, in Home Health Services v. Currie, 706 F.2d 497 (4th Cir. 1983) (per curiam), this court was faced with a claim alleging a private right of action under the Medicare Act. The court applied Cort v. Ash and concluded that no such private right of enforcement existed. The court noted that, although a §1983 claim had not been raised at trial, one had been argued on appeal. Assuming, arguendo, that the issue was properly before it, the court stated that "the conclusion that Home Health has no right of action [under this statute] compels the conclusion that Home Health likewise has no cause of action under §1983. . . ." Id. at 498 (citing Perry, 664 F.2d at 1217-18). Read in context,

this language means "as in Perry, we find that based upon the same elements which lead us to conclude that no private right of action exists under Cort v. Ash, we conclude that there is no §1983 right under Middlesex." Taken out of context, however, it could imply, incorrectly, that application of the Cort v. Ash test suffices to answer the §1983 inquiry as well, i.e., that the conclusion that there is no private right of action leads inexorably to dismissing a §1983 action.

The potential for misinterpreting this language may have been foreshadowed in Phelps v. Housing Authority, 742 F.2d 816 (4th Cir. 1984). In Phelps, as in Perry, the plaintiffs attempted to sue under the broad policy provisions of the Housing Act, but, unlike the Perry plaintiffs, the tenants urged their claim solely under §1983. Applying Pennhurst, Middlesex, and Perry, the court in Phelps concluded that a §1983 action was not proper. In a footnote, the court noted:

> Appellants argue that the district court erred in holding tha 42 U.S.C. §1437d(c)(4)(A) and 42 U.S.C. §1437d(c)(3)(ii) do not give rise to implied private causes of action. It is somewhat unclear whether they make this argument only in response to the district court's holding that in order for a violation of a federal statute to be actionable under §1983, that statute must be of such a quality that in essence it gives rise to such an implied action, or whether they suggest that they had asserted such a private right of action that was erroneously denied.
>
> As both the complaint and the court's opinion are cast in §1983 terms, we consider the former interpretation more plausible. The inquiry under either interpretation of the appellant's position is similar, if not perfectly congruent. Nevertheless, lest our disposition of the case seem incomplete, we reject plaintiffs' implied private cause of action argument on the reasoning of [Perry].

742 F.2d at 822, n. 10 (emphasis added).

The subject case was brought exclusively under §1983. In its Memorandum Opinion, the district court quoted from Home Health the dictum that "the conclusion that Home Health has no

right of action . . . under 42 U.S.C. §1359a compels the conclusion that Home Health likewise has no cause of action under §1983. . . ." Thus, the district court concluded that "a determination of whether the plaintiffs have been deprived of 'rights, privileges, or immunities' within the meaning of §1983 should begin with a determination of whether an implied right of action exists under the Brooke Amendment." Wright v. City of Roanoke Redevelopment and Housing Authority, No. 82-0908, Slip Op. at 3 (W.D.W.Va. Dec. 21, 1984). The court proceeded to apply Cort v. Ash, and found no private right of action. The district court then discussed Middlesex, but in the final analysis, the court decided that plaintiffs could not bring their action under §1983 based on its conclusion that no private right of action existed, plus the "compels" language of Home Health. Slip Op. at 11. This seems to represent a misinterpretation of Home Health and a confusion of the appropriate analysis for these two distinct remedial devices.

It is clear from Perry, Phelps, and from this court's opinion today that the correct inquiry to determine whether a §1983 action is proper is set forth in Pennhurst and Middlesex. While any confusion is understandable, it was unnecessary and inappropriate to consider Cort v. Ash and its progeny in the subject case. Although the §1983 analysis closely parallels the Cort v. Ash inquiry for implied private rights of action, the two are distinct, however subtly. It is only to emphasize this distinction that I felt compelled to add my voice to the opinion of this court, for I concur fully in its opinion.

IN THE UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

BRENDA E. WRIGHT, et al.,
Plaintiffs,

vs.

CITY OF ROANOKE REDEVELOPMENT AND HOUSING AUTHORITY,
Defendant

Civil Action No. 82-0908

MEMORANDUM OPINION

By: James C. Turk
Chief District Judge

On December 8, 1982, Plaintiffs, who are tenants of public low-cost housing, filed suit in this court against their landlord, the City of Roanoke Redevelopment and Housing Authority[1] ("RRHA"). In their complaint, Plaintiffs alleged that RRHA violated the Brooke Amendment of the United States Housing Act of 1937, 42 U.S.C. § 1437(a) (1983), and its implementing regulations, 24 C.F.R. §§ 865.470-.482 (1983), in that it had set the utility allowances unreasonably low and failed to revise them, so that RRHA might collect greater excess consumption surcharges from the majority of tenants. They also claimed that RRHA had disregarded federal law prescribing how such allowances are to be maintained. The Brooke Amendment provides that public housing tenants be charged no more than twenty-five to thirty percent of their adjusted income for rent, which by definition includes an established amount of

1. On August 10, 1983, this action was certified as a class action, the class being comprised of tenant families in seven projects of public housing in the City of Roanoke.

utilities.[2] Plaintiffs based their claims for relief upon 42 U.S.C. § 1983 and the lease contracts between Plaintiffs and Defendant RRHA.

On May 14, 1984, Defendant RRHA moved for judgment on the pleadings, pursuant to Rules 12(c) and (h)(2) of the Federal Rules of Civil Procedure. In its motion, RRHA challenges the legal sufficiency of plaintiffs' cause of action. RRHA asserts that: 1) the plaintiffs have no private right of action under the Brooke Amendment and that enforcement depends solely on the action of the United States Department of Housing and Urban Development ("HUD"), 2) the Housing Act does not create any substantive rights which would allow the plaintiffs to proceed under § 1983, and 3) HUD is an indispensable party to the action and the plaintiffs' failure to join it mandates dismissal. Since matters outside the pleadings have been submitted to and considered by this court, the defendant's motion shall be treated as one for summary judgment and disposed of in accordance with Rule 56 of the Federal Rules of Civil Procedure. See Fed. R. Civ. P. 12(c), 56.

I.

INTRODUCTION

In Home Health Services, Inc. v. Currie, 706 F.2d 497 (4th Cir. 1983), a provider of home health services brought suit against a physician and the state medical university for alleged violations of the Medicare Act, 42 U.S.C. § 1395a (1983),

2. Gross rent is the amount of rent chargeable to a tenant for the use of the dwelling accommodation, equipment, ... services, and Utilities not to exceed the Allowances for PHA-Furnished Utilities.... 24 C.F.R. § 865.472. Allowances for Public Housing Authority ("PHA")-Furnished Utilities represent the maximum consumption units (e.g. kilowatt hours of electricity) which may be used by a dwelling unit without a surcharge for excess consumption against the tenant. 24 C.F.R. § 470.

and federal civil rights statutes. The Fourth Circuit Court of Appeals found that Home Health had no implied right of action under the Medicare Act, and went on to state that "the conclusion that Home Health has no right of action ... under 42 U.S.C. § 1359a compels the conclusion that Home Health likewise has no cause of action under §§ 1983 and 1985." Home Health, 706 F.2d at 498.[3] Thus this court feels that under the Fourth Circuit's analysis, a determination of whether the plaintiffs have been deprived of "rights, privileges, or immunities" within the meaning of § 1983[4] should begin with a determination of whether an implied right of action exists under the Brooke Amendment.

II.

PRIVATE RIGHT OF ACTION UNDER THE BROOKE AMENDMENT

In determining whether a private right of action may be implied from a statute when legislation does not provide expressly for such a remedy, a court must focus on congressional intent. Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 377 (1982). Since 1975, the prevailing standard for determining whether Congress intended to imply such a right of action is that set forth in Cort v. Ash:

> First, is the plaintiff "one of the class for whose especial benefit the statute was enacted" ... that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? ... Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff?... And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal laws?

422 U.S. 66, 78 (1975)(citations omitted). Although later cases favored a somewhat different but related approach, see, e.g., Transamerica Mortgage Advisor, Inc. (TAMA) v. Lewis, 444 U.S. 11, 15-16 (1979); Touche Ross & Co. v. Reddington, 442 U.S. 560, 568 (1979), the Supreme Court has recently reaffirmed the use of the Cort analysis. Daily Income, Inc. v. Fox, 104 S.Ct. 831, 839 (1984).

The first inquiry under Cort is whether Congress intended to create a special class of beneficiaries which includes the plaintiffs, and, if so, whether Congress intended to confer federal rights upon such beneficiaries. In construing sections 1437(c) and 1441, two general policy sections of the Housing Act, the Fourth Circuit Court of Appeals determined that: "First, the purpose of the legislation was to help the states; second, the purpose in helping the states was ultimately to benefit low income families. Thus the legislation had two beneficiaries-states as direct beneficiaries and low-income families as indirect beneficiaries." Perry v. Housing Authority of City of Charleston, 664 F.2d 1210, 1213 (4th Cir. 1981). The Perry court also found that "[t]here is clearly no indication in the legislation or in [the] history [of the Housing Act] that Congress intended to create in public housing tenants a federal right of action against their municipal landlords." Id.

The court, combining factors three and four of the Cort analysis, determined that:

> it would plainly be inconsistent with any legislative scheme in the federal legislation to imply a private cause of action where the

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3. The Fourth Circuit cited Perry v. Housing Authority of City of Charleston, 664 F.2d 1210, 1217 18 (4th Cir. 1981) as standing for this conclusion.

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4. 42 U.S.C. § 1983 provides, in relevant part, that:
> Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

> legal right involved is one traditionally left to state law. It would be hard to find an area of the law in which the states have a greater interest or have had greater involvement than in the legal area of landlord-tenant.

Id. at 1216. Thus, the court held that there was no implied cause of action under the Housing Act against a local housing authority.

In applying the Cort analysis to the provisions of the Brooke Amendment, this court sees no reason to deviate from the conclusuons reached by the Fourth Circuit in Perry. The Brooke Amendment provided, at the time this suit was filed:

> (a) Dwelling units assisted under this Act shall be rented only to families who are lower income families at the time of their initial occupancy of such units. A family shall pay as rent for a dwelling unit assisted under this Act the highest of the following amounts, rounded to the nearest dollar:
>
> 1) 30 per centum of the family's monthly adjusted income;
> 2) 10 per centum of the family's monthly income; or
> 3) if the family is receiving payments for welfare assistance from a public agency and a part of such payments, adjusted in accordance with the family's actual housing costs, is specifically designated by such agency to meet the family's housing costs, the portion of such payment which is so designated.

42 U.S.C. § 1437a(a) (1983). This relevant portion of the Brooke Amendment sets a limit on rent chargeable to tenants of low income housing. By definition, this rent includes utilities in an amount not to exceed that set by the Housing Authority, 24 C.F.R. §§ 860.403(a), 865.472 (1983), and approved by HUD. 24 C.F.R. § 865.473 (1983). The Brooke Amendment provisions apply only to lower income families who rent "dwelling units assisted under [the United States Housing] Act [of 1937]." 42 U.S.C. § 1437a(a) (1983)(emphasis added). Plaintiffs concede that the Housing Authority operates "its projects with federal subsidy

pursuant to an Annual Contribution Contract"[5] from HUD, and that "HUD retains general enforcement authority." Plaintiffs' Brief in Support of Summary Judgment p. 3, 18. Thus, although low income families are certainly one of the beneficiaries of the Brooke Amendment, they are not the only beneficiaries. Consistent with the other provisions of the Housing Act, "the legislation had two beneficiaries - states as direct beneficiaries and low-income families as indirect beneficiaries." Perry, 664 F.2d at 1213.

Although finding that an implied right of action existed under the Brooke Amendment against HUD, the United States Court of Appeals for the Sixth Circuit, in Howard v. Pierce, 738 F.2d 722 (6th Cir. 1984), "could discern no justifiction for extending such a cause of action to a public housing agency...." Id. at 730. In so holding, the Sixth Circuit, applying the second Cort factor, found that "nowhere in the legislative history... [was there] an expression of intent either to provide or deny a private means of enforcing the Brooke Amendment." Id. at 727. As the Fourth Circuit determined in Perry, "Congress need not fear that unless it specifically denies a cause of action, the courts will automatically imply one; when Congress is silent there is no presumption in favor of a legislatively created cause of action." Perry, 664 F.2d at 1213. Thus, under the Cort analysis, this court holds that there exists no implied right of action under the Brooke Amendment against a public housing authority such as RRHC.[6]

---

5. Annual Contributions Contract ("ACC")

> A contract (in the form prescribed by HUD) for loans and annual contributions whereby HUD agrees to provide financial assistance and the PHA agrees to comply with HUD requirements for the development and operation of a public housing project.

24 C.F.R. § 841.103 (1983).

---

6. Other courts have reached a similar conclusion. See Howard v. Pierce, 738 F.2d 722 (6th Cir. 1984); McGhee v. Housing Authority of City of Lanett, 543 F.Supp. 607 (M.D. Ala. 1982); Jackson v. Housing Authority of City of Fort Myers, No. 82-136-CIV-A.N.-17 (M.D. Fla. April 4, 1984).

III.

CAUSE OF ACTION UNDER 42 U.S.C. § 1983

42 U.S.C. § 1983 provides for the redress of deprivations of rights secured by the United States Constitution or statutes under color of state law. Though there is no constitutional right to the housing involved here and thus no constitutional violation, Lindsey v. Normet, 405 U.S. 56, 74 (1972), the Supreme Court has recognized that a § 1983 action may be based solely upon a violation of a federal statutory right. Maine v. Thiboutot, 448 U.S. 1 (1980). In order to prevail under a purely statutory-based § 1983 claim, however, the court must determine "[f]irst, whether Congress, in enacting the statute, manifested in the statute itself an intent to foreclose its private enforcement [and] [s]econd, whether the statute is of a kind aimed at creating enforceable 'rights' under § 1983." Phelps v. Housing Authority of Woodruff, 742 F.2d 816, 820 (4th Cir. 1984); Middlesex City Sewage Authority v. National Sea Clammers Association, 453 U.S. 1, 17, 20 (1981). Failing either of these, there can be no cause of action under § 1983. Pennhurst State School and Hospital v. Halderman, 451 U.S. at (1981).

An analysis of the language of the statute itself shows that there is no explicit denial of private enforcement; however, this court is of the opinion that Congress has evinced, in the implementing regulations of the Brooke Amendment, an intent to foreclose private enforcement. The implementing regulations provide two means by which utilities may be provided: PHA-Furnished Utilities and Tenant Purchased Utilities.

> Allowances for PHA-Furnished Utilities represent the maximum consumption units (e.g., kilowatt hours of electricity), which may be used by a dwelling unit without a surcharge for excess consumption against the tenant. Allowances for Tenant-Purchased Utilities represent fixed dollar amounts which are deducted from the Gross Rent otherwise chargeable to a tenant who pays the actual Utility charges directly to the Utility suppliers whether they be more of [sic] less than the amounts of the Allowances.

24 C.F.R. § 865.470 (1983). These regulations provide for relief from excess charges of both PHA-Furnished and Tenant Purchased Utilities where a possible defect in the utility meter or error in the meter reading is involved, and in the case of PHA-Furnished utilities, if there is a defect in the dwelling. 24 C.F.R. § 865.481(a)(1),(a)(2) (1983). However, requests for relief from excess consumption on the grounds "that the utility consumption exceeds the applicable Allowance by 20 percent or more for reasons other than wasteful or unauthorized usage" are permitted "[i]n the case of Tenant-Purchased utilities only." 24 C.F.R. § 865.481(a)(3) (1983). Since the HUD regulations permit such requests for relief to be submitted to the PHA solely in the case of Tenant-Purchased Utilities, it is clear that such requests are foreclosed in a case such as this involving PHA-Furnished Utilities. Because Congress has "manifested an intent" to foreclose private enforcement, the plaintiffs have no enforceable rights within the meaning of section 1983 against a public housing authority such as RRHC.

Secondly, although the Brooke Amendment clearly manifests congressional intent to benefit generally tenants of public housing, its chosen means of accomplishing that end is for HUD, rather than the tenants themselves, to enforce the statutory requirements. RRHA operates its projects with federal subsidies pursuant to an Annual Contributions Contract ["ACC"] "whereby HUD agrees to provide financial assistance and [RRHA] agrees to comply with HUD requirements for the development and operation of a public housing project." 24 C.F.R. § 841.103.[7] Plaintiffs

---

7. Section 5(1) of the Annual Contributions Contract between HUD and RRHA also provides that "[t]he Local Authority shall. . . operate all Projects covered by this Contract in compliance with all provisions of Contract and all applicable provisions of the [United States Housing] Act [of 1937]. . . ." Section 311 allows HUD to inspect and to audit all the books, documents, papers, and records of the Local Authority that are pertinent to its operations with respect to financial assistance under the Act.

allege that RRHA has failed to follow federal law prescribing how utility allowances are to be set and maintained. If RRHA has indeed breached any of the conditions of the Annual Contributions Contract, HUD has "the right... to maintain any and all actions at law or in equity against the Local Authority to enforce the correction of any such default or to enjoin any such default or breach." HUD Annual Contributions Contract §508. "In sum, the whole of the legislative scheme ... indicates Congress's intention that HUD should continue to enforce required conditions by means of asserting its rights under the ACC, thereby intending 'to foreclose private enforcement' of the requirements of the Housing Act." Phelps v. Housing Authority of Woodruff, 742 F.2d 816, 821 (4th Cir. 1984).

Even where the implementing regulations of the Brooke Amendment and the provisions of the ACC found not to foreclose private enforcement, the Fourth Circuit Court of Appeals has determined that in order for a violation of a federal statute to create "rights, privileges, or immunities" within the meaning of § 1983, it must at the least be of a kind that gives rise to an implied cause of action. In Perry, the court determined that the Housing Act did not create rights enforceable in private actions under § 1983. Although it could be argued that the provisions involved here are more specific than those in Perry and thus create such enforceable rights, this court must reject such a narrow interpretation of Perry in view of the fact that the Court of Appeals did not specifically limit its ruling to the provisions involved.[8] If there were any doubt as to the

8. In Phelps, the Fourth Circuit Court of Appeals also declined to limit its holding in Perry, when it stated that "[a]lthough it might be argued that Perry is distinguishable, since the preference and notice rights [here] are more specific ... we are not persuaded that this distinction is of sufficient moment to alter our conclusion that the defendants' actions did not deprive the plaintiffs of any 'rights secured by the ... laws of the United States.'"

principle enunciated in Perry, it was dispelled by the holding in Home Health that "the conclusion that Home Health has no [implied] right of action... under 42 U.S.C. § 1395a compels the conclusion that Home Health likewise has no cause of action under §§ 1983 and 1985." Home Health, 706 F.2d at 498. (emphasis added).

Because this court finds that the plaintiffs have failed to state a cause of action under 42 U.S.C. § 1983,[9] the defendant's Motion for Summary Judgment must be GRANTED. Each side shall bear its own taxable costs. An accompanying order shall be entered this day.

The Clerk of Court is directed to send certified copies of this opinion to counsel of record.

DATED: This 21st day of December 1984.

Chief U. S. District Judge

A TRUE COPY, TESTE:
Joyce F. [illegible], Clerk
By: [signature]
Deputy Clerk

9. Since this court finds that the plaintiffs have failed to state a claim under § 1983, it is unnecessary to determine whether HUD is an indispensable party to the action. This court also dismisses the plaintiffs' cause of action based on the defendant's alleged breach of its lease agreements with the plaintiffs, under the doctrine of pendant jurisdiction as set forth in United Mine Workers v. Gibbs, 383 U.S. 715 (1966)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

BRENDA E. WRIGHT, et al., Plaintiffs,	)	CIVIL ACTION NO. 82-0908
vs.	)	ORDER
CITY OF ROANOKE REDEVELOPMENT AND HOUSING AUTHORITY, Defendant	)	BY: James C. Turk, Chief District Judge

In accordance with the Court's Memorandum Opinion filed this day, it is hereby

ORDERED

that the defendant's Motion for Summary Judgment shall be, and hereby is, GRANTED.

The Clerk of Court is directed to send certified copies of this Order to counsel of record.

ENTER: This 21st day of December, 1984.

Chief U. S. District Judge

A TRUE COPY, Teste:
Joyce F. Witt, Clerk
By: Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

BRENDA E. WRIGHT, et al., etc., Plaintiffs	)	
v.	)	CONSENT ORDER ON CLASS CERTIFICATION AND NOTICE
CITY OF ROANOKE REDEVELOPMENT AND HOUSING AUTHORITY, Defendant	)	Civil Action No. 82-908

This case was brought as a class action under Rule 23(a) and (b)(2) and (b)(3) of the Federal Rules of Civil Procedure. The parties have represented to the court that they have agreed upon the procedure by which the case shall go forward as a class action, and their agreement is reflected in this order and the incorporated notice.

The court confirms that upon the allegations of the complaint, the case is properly maintained as a class action under the requirements of Rule 23(a), (b)(2) and (b)(3). The action would appear to affect over 1000 tenant families in seven projects of public housing in the City of Roanoke. Issues of law and fact concerning the City of Roanoke Redevelopment and Housing Authority's ("the Authority's") standard lease and utility policy are common to all tenants. The claims of the representative parties appear to be those which might be raised by any other tenant family, and no antagonistic interest is apparent. The representative parties appear situated to fairly and adequately protect the interests of the class, and are represented by counsel familiar with class civil rights claims. The Authority policy and practices here challenged appear to be generally applicable to all tenant families in seven projects, making class declaratory and injunctive relief under (b)(2) appropriate for consideration. Finally, it appears that the common questions about Authority policy and practices predominate over individual computation issues, making a class action under (b)(3) the superior method for fair and efficient adjudication of the controversy.

Accordingly, it is ORDERED that:

1. The case is certified as a class action pursuant to Rule 23(a) and (b)(2) and (b)(3).

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

NOTICE

Certain persons have brought a suit against the City of Roanoke Redevelopment and Housing Authority. The persons who have brought this suit are referred to as the plaintiffs. The United States District Court has certified the action as a class action which means that the plaintiffs may represent not only themselves but also any person who is a member of the class which the court has defined. The court has defined the class as all tenants of Landsdowne Park, Lincoln Terrace, Hurt Park, Hunt Manor, Jamestown Place, Bluestone Park, and Indian Rock Village who have been, or will be during the course of litigation, surcharged for consumption of electric utility service in excess of allowances established by the City of Roanoke Redevelopment and Housing Authority. The class includes all those affected retroactively to January 7, 1981.

The plaintiffs are asking the court to do the following things:

1. Decide that the way the City of Roanoke Housing Authority determines and collects charges for the use of excess electricity is in violation of federal law and the tenants' leases;

2. Require the City of Roanoke Housing Authority to calculate in accordance with law all future charges for excess electricity use;

3. Require the City of Roanoke Housing Authority to refund to the members of the class any excess electricity charges it has collected from them.

The City of Roanoke Redevelopment and Housing Authority denies that any surcharge in violation of law has been collected and denies that any refund is owed to members of the class.

The purpose of this notice is to tell you about the lawsuit so that you can decide whether you wish to remain a member of the

2. The class is defined as all tenants of Landsdowne Park, Lincoln Terrace, Hurt Park, Hunt Manor, Jamestown Place, Bluestone Park and Indian Rock Village who have been, or will be during the course of litigation, surcharged for consumption of electric utility service in excess of allowances established by the City of Roanoke Redevelopment and Housing Authority. This class includes all those affected retroactively to January 7, 1981.

3. Notice shall be given to class members in the form attached to this order. The court finds that the best notice practicable under the circumstances is individual notice to all present tenants of the specified projects of the defendant Housing Authority and notice by publication designed to reach those persons who were tenants in the specified projects and paid a utility surcharge subsequent to January 7, 1981, but who have since terminated their tenancy. The notice to the present tenants shall be printed at the expense of plaintiffs and mailed by defendant Housing Authority in the same envelopes as rental notices for the first month practicable following entry of this order. Defendant's counsel shall file a certificate confirming the completion of this procedure. The notice to those who have terminated their tenancy shall be published at plaintiffs' expense and shall be published once each week for two successive weeks in the Roanoke Times & World-News. Plaintiffs' counsel shall file a certificate confirming the completion of this procedure.

ENTER:

James C. Turk

James C. Turk, Chief Judge

Entered by consent of

LEGAL AID SOCIETY OF
ROANOKE VALLEY
Counsel for Plaintiffs

By Henry L. Woodward
Henry L. Woodward

WOODS, ROGERS, MUSE, WALKER &
THORNTON
Counsel for defendant

By Thomas T. Lawson
Thomas T. Lawson

A TRUE COPY, TESTE:

Joyce F. Witt, Clerk

By: C. Hurd
Deputy Clerk

class or to be excluded from the class. Under the law, each class member has the right to be excluded from the class if he or she requests the court to exclude him. If you do not ask to be excluded, you will be included in any decision the court eventually makes whether that decision is favorable to the class or not. If you do not ask to be excluded, you may, if you wish, enter an appearance in this suit through your own lawyer on or before October 1, 1983.

If you desire to be excluded from the class, you must notify the court by letter or postcard postmarked no later than Oct. 1, 1983. The letter or postcard must clearly state your name and address and must simply state that you wish to be excluded from the class in the case of "Wright v. Housing Authority". The letter should be addressed as follows:

United States District Court For
the Western District of Virginia
P. O. Box 1234
Roanoke, Virginia 24006

THE SENDING OF THIS NOTICE IS NOT TO BE CONSTRUED AS AN EXPRESSION OF ANY OPINION BY THE COURT ON THE MERITS OF THE SUIT WITH RESPECT TO THE CLASS MEMBERS.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

BRENDA E. WRIGHT, et al., etc.,)
)
Plaintiffs)
)
v.) CONSENT ORDER ON CLASS NOTICE
)
CITY OF ROANOKE REDEVELOPMENT AND HOUSING AUTHORITY) Civil Action No. 82-908
)
Defendant)

On August 10, 1983, this Court certified this action as a class action and set out certain requirements for the notice to the class. These requirements included notification to the class members that they might seek exclusion from the class or enter an appearance through counsel by October 1, 1983. Counsel have advised the Court that they were unable to arrange for notice in time for class members to act by October 1 if they chose either of the foregoing options. Counsel have moved the Court for an order changing the deadline from October 1, 1983 to November 1, 1983, but otherwise reaffirming the provisions of the August 10 order. The Court finds that the relief sought is proper.

According, it is ORDERED that notice shall be given to the class in the forms attached to this order and that all other provisions of August 10, 1983, order of this Court are continued in effect.

ENTER:

James C. Turk, Chief Judge

A TRUE COPY, TESTE:
JOYCE F. WITT, CLERK
BY: ... DEPUTY CLERK

Entered by the consent of

THE LEGAL AID SOCIETY OF ROANOKE VALLEY
Counsel for Plaintiffs
By Henry L. Woodward
Henry L. Woodward

WOODS, ROGERS, MUSE, WALKER & THORNTON
Counsel for defendant
Thomas F. Lawson

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

Roanoke Division

NOTICE

Certain persons have brought a suit against the City of Roanoke Redevelopment and Housing Authority. The persons who have brought this suit are referred to as the plaintiffs. The United States District Court has certified the action as a class action which means that the plaintiffs may represent not only themselves but also any person who is a member of the class which the court has defined. The court has defined the class as all tenants of Lansdowne Park, Lincoln Terrace, Hurt Park, Hunt Manor, Jamestown Place, Bluestone Park, and Indian Rock Village who have been, or will be during the course of litigation, surcharged for consumption of electric utility service in excess of allowances established by the City of Roanoke Redevelopment and Housing Authority. The class includes all those affected retroactively to January 7, 1981.

The plaintiffs are asking the court to do the following things:

1. Decide that the way the City of Roanoke Housing Authority determines and collects charges for the use of excess electricity is in violation of federal law and the tenants' leases;

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3. Require the City of Roanoke Housing Authority to refund to the members of the class any excess electricity charges it has collected from them.

The City of Redevelopment and Housing Authority denies that any surcharge in violation of the law has been collected and denies that any refund is owed to members of the class.

The purpose of this notice is to tell you about the lawsuit so that you can decide whether you wish to remain a member of the class or to be excluded from the class. Under the law, each class member has the right to be excluded from the class if he or she requests the court to exclude him. If you do not ask to be excluded, you will be included in any decision the court eventually makes whether that decision is favorable to the class or not. If you do not ask to be excluded, you may, if you wish, enter an appearance in this suit through your own lawyer on or before November 1, 1983.

If you desire to be excluded from the class, you must notify the court by letter or postcard postmarked no later than November 1, 1983. The letter or postcard must clearly state your name and address and must simply state that you wish to be excluded from the class in the case of "Wright v. Housing Authority". The letter should be addressed as follows:

United States District Court For
the Western District of Virginia
P. O. Box 1234
Roanoke, Virginia 24006

THE SENDING OF THIS NOTICE IS NOT TO BE CONSTRUED AS AN EXPRESSION OF ANY OPINION BY THE COURT ON THE MERITS OF THE SUIT WITH RESPECT TO THE CLASS MEMBERS.

42 U.S.C.

§1983 Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.

§1437a Rental payments; definitions

(a) Dwelling units assisted under this chapter shall be rented only to families who are lower income families at the time of their initial occupancy of such units. A family shall pay as rent for a dwelling unit assisted under this chapter the highest of the following amounts, rounded to the nearest dollar:

(1) 30 per centum of the family's monthly adjusted income... .

24 C.F.R.

§865.470 Purpose. (effective September 9, 1980)

The purpose of §§865.470 through 865.482 is to establish procedures to be used by PHAs in establishing and administering Allowances for PHA-Furnished Utilities and Allowances for Tenant-Purchased Utilities. Allowances for PHA-Furnished Utilities represent the maximum consumption units (e.g., kilowatt hours of electricity) which may be used by a dwelling unit without a surcharge for excess consumption against the tenant. Allowances for Tenant-Purchased Utilities represent fixed dollar amounts which are deducted from the Gross Rent otherwise chargeable to a tenant who pays the actual utility charges directly to the Utility suppliers whether they be more of [sic] less than the amounts of the Allowances.

§865.473 Establishment of allowances of PHAs. (effective September 9, 1980)

(a) Basic Requirement. PHAs shall establish (1) allowances for PHA-Furnished Utilities for all Checkmetered Utilities and (2) allowances for Tenant-Purchased Utilities for all Utilities purchased directly by tenants from the Utilities suppliers. These Allowances shall be incorporated into the PHA's rent schedules and shall be submitted for approval by the HUD field office, after compliance with requirements of notice to tenants prescribed under 24 CFR Part 861.

(b) Authorized Uses of Utilities on which Allowances Are Based. Allowances for both PHA-Furnished and Tenant-Purchased Utilities shall be designed to include Utility consumption requirements for major equipment furnished by the PHA (for example, heating furnace, hot water heater, range and refrigerator) and for minor items of equipment (such as toasters and can openers) furnished by the tenants. To avoid misunderstanding, the PHA shall include with the rent schedules a statement of the specific items of major equipment whose Utility consumption requirements were included in determining the amounts of the Allowances. This does not mean that tenants may not supply and use other items of major equipment, but if they do so the cost of any Utility consumption in excess of the applicable allowance will have to be borne by the tenant.

§865.477 Standards for allowances for PHA-furnished utilities. (effective September 9, 1980)

The Allowances for PHA-Furnished Utilities for each dwelling unit category and unit size shall be established in terms of consumption units, sufficient to meet the requirements of about 90% of the dwelling units in the category. Conversely the Allowances should be such as are likely to result in surcharges for about 10% of the dwelling units. The basic method of determining the Allowances should be as follows:

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

No. 85-5915

BRENDA F. WRIGHT, GERALDINE H. BROUGHMAN, and SYLVIA P. CARTER, individually and on behalf of all persons similarly situated,

Petitioners,

v.

CITY OF ROANOKE REDEVELOPMENT AND HOUSING AUTHORITY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

BAYARD E. HARRIS
(Counsel of Record)
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Roanoke, Virginia 24011

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Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent City of Roanoke Redevelopment and Housing Authority, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Fourth Circuit's opinion in this case. That opinion is reported at 771 F.2d 833.

QUESTION PRESENTED

Do public housing tenants have a federal cause of action under 42 U.S.C. § 1983 to redress individual grievances arising out of their local landlord's implementation of technical utility regulations promulgated by the Department of Housing and Urban Development?

STATEMENT OF THE CASE

Petitioners are tenants of public low-cost housing projects located in the City of Roanoke, Virginia. Respondent, the City of Roanoke Redevelopment and Housing Authority ("RRHA"), is a local public housing authority ("PHA") which manages lower income housing projects pursuant to an Annual Contributions Contract ("ACC") with the Department of Housing and Urban Development

("HUD"). This contract is required by the Public Housing Act of 1937, 42 U.S.C. §§ 1437-1437j (1985) ("the Act") and requires the PHA to abide by the Act and the regulations issued thereunder.[1] Among the many regulations promulgated by HUD, public housing authorities are directed to provide certain utilities, including electricity, in accordance with an allowance scheme. 24 C.F.R. §§ 865.470-.482 (1980), superceded by 24 C.F.R. §§ 965.470-.480 (1985).

The Housing Act announces the policy of Congress to assist the States in remedying unsafe and unsanitary housing conditions and to alleviate the acute shortage of decent, safe, and sanitary dwellings for low-income families. The Act also establishes the maximum "a family shall pay as rent" for dwelling units subsidized under the statute. 42 U.S.C. § 1437a (1985). Nowhere in the Housing Act does Congress provide tenants with free electricity or other utilities.

On December 8, 1982, Petitioners filed suit for injunctive relief and damages in the United States District Court for the Western District of Virginia against RRHA, contending that Petitioners' PHA-allowed electricity (and surcharges for excess usage) were not being provided in accordance with the Act and HUD regulations. Petitioners' action was based solely on 42 U.S.C. § 1983, seeking redress for deprivation of "rights, privileges or immunities secured by the Constitution and laws" alleged to arise from the failure of RRHA to properly or fully implement HUD regulations governing the establishment of electrical utility allowances.

On December 21, 1984, the district court, treating RRHA's motion for judgment on the pleadings as a motion for summary judgment, dismissed the Petitioners' case, concluding that

[1]The ACC between RRHA and HUD was made part of the record in this case by affidavit in the district court and was considered by the courts below in reaching their decisions. Pertinent portions of the ACC are set out in the Appendix hereto. (Respondent's Appendix, A. 5-6).

Petitioners have no right of action under 42 U.S.C. § 1983.[2] Petitioners appealed the district court's decision to the United States Court of Appeals for the Fourth Circuit, challenging the district court's holding that Petitioners have no § 1983 remedy.[3] Petitioners' claim for injunctive relief was mooted by HUD's adoption of new utility regulations, effective October 2, 1984, and RRHA's revision of its utility allowances pursuant to the new utility regulations. Accordingly, Petitioners' sole claim in the circuit court was one for damages. The circuit court, applying the tests set out in Middlesex County Sewerage Authority v. National Sea Clammers Ass'n, 453 U.S. 1 (1981), and Pennhurst State School & Hospital v. Halderman, 451 U.S. 1 (1981), concluded that no § 1983 action was available to Petitioners and that HUD alone is the party which must take legal action to enforce the provisions of the Act and its implementing regulations against the local PHA.[4] (Petitioners' Appendix, A. 6-7).

The lower courts have not addressed the underlying facts or the merits of Petitioners' substantive claim. RRHA's compliance or noncompliance with the regulations, the amount of electricity provided, and the propriety of any surcharges are not at issue in this appeal. The sole issue in this case is whether the Fourth Circuit erred in concluding that tenants of low-cost public housing have no right of action under § 1983 against a local

[2]The district court also found that Petitioners have no implied right of action under the Housing Act. Petitioners do not contend that such implied right of action exists and thus do not challenge this aspect of the district court's decision. (Petition, p. 5).

[3]Petitioners also asserted a right of action grounded in RRHA's alleged violation of the standard lease agreement between tenants and the Authority, which the circuit and district courts properly dismissed as a pendent claim pursuant to United Mine Workers v. Gibbs, 383 U.S. 715 (1966). Such lease creates a landlord-tenant relationship governed by state law. The mere fact that the lease is subject to federal regulation does not, in itself, give rise to federal question jurisdiction of its performance or enforcement. See Lindy v. Lynn, 501 F.2d 1367 (3rd Cir. 1974); Ames-Ennis, Inc. v. Midlothian Ltd. Partnership, 469 F. Supp. 939, 944 (D.Md. 1979); Molton, Allen & Williams, Inc. v. Harris, 436 F. Supp. 853, 857 (D.D.C. 1977).

[4]Indeed, despite RRHA's assertion that HUD is an indispensable party in this suit (Petitioners' Appendix, A. 16) and Petitioners' allegation that HUD has "spurned" its administrative obligations in failing to enforce its contract with the RRHA (Petition, pp. 8-9), Petitioners have consistently refused to join HUD as a party to this suit.

housing authority to recover damages arising out of the housing authority's alleged violation of HUD regulations promulgated pursuant to the Housing Act.

REASONS FOR DENYING THE WRIT

I. THE FOURTH CIRCUIT APPLIED THE PROPER TESTS BELOW; THERE IS NO NEED FOR THIS COURT TO RESTATE THE WELL-ESTABLISHED DISTINCTIONS BETWEEN THE CORT v. ASH TEST FOR AN IMPLIED PRIVATE RIGHT OF ACTION AND THE PENNHURST AND MIDDLESEX TESTS FOR A RIGHT OF ACTION UNDER 42 U.S.C. § 1983.

In Maine v. Thiboutot, 448 U.S. 1 (1980), this Court determined that the phrase "and laws" contained in § 1983 should be interpreted literally to include violations of federal law committed by state officials. As soon became apparent, however, an overly broad interpretation of Thiboutot would prove particularly burdensome to state officials attempting to comply with the myriad of federal directives and would undermine agency authority to promulgate regulations and enforce policy objectives. Accordingly, this Court swiftly noted exceptions to Thiboutot in Pennhurst State School & Hospital v. Halderman, 451 U.S. 1 (1981), and Middlesex City Sewage Authority v. National Sea Clammers Ass'n, 453 U.S. 1 (1981). These decisions make clear, as the Fourth Circuit noted below, that claimants cannot bring suit in federal court any time there is an alleged violation of federal law by state actors. A § 1983 remedy is available only if it can be shown that the statute allegedly violated creates "rights" sufficient to trigger a § 1983 right of action, Pennhurst, 451 U.S. at 28, and that Congress did not preclude a § 1983 remedy by expressly or impliedly foreclosing private enforcement of that statute in the enactment itself. Middlesex, 453 U.S. at 20. As the Fourth Circuit's opinion correctly reflects, the Pennhurst and Middlesex tests are independent of the analysis that this Court adopted in Cort v. Ash, 422 U.S. 66 (1975), to determine whether a private right of action may be implied from a statute.

The Fourth Circuit properly applied the Pennhurst and Middlesex tests in the proceedings below; Petitioners' assertion

that the Fourth Circuit's decision heavily relied on the Cort v. Ash implied right of action analysis is unfounded. (Petition, pp. 9-11). The Fourth Circuit's discussion of Cort v. Ash, set out in a closing footnote, simply examined how the Cort analysis might have been applied in this case. (Petitioners' Appendix, A. 8-9, n.9). The circuit court's brief exposition of this alternative analysis was wholly advisory. Rendered in an effort to make the court's decision complete, the Fourth Circuit's review of the question is analogous to this Court's discussion sua sponte in Middlesex of the petitioner's alternative right of action under § 1983. 453 U.S. at 19. Indeed, Judge Gordon's concurrence in the Fourth Circuit reiterates that the § 1983 and Cort v. Ash tests, though similar, are discreet and reassures that the Fourth Circuit decision in the instant case is based on the "correct inquiry." (Petitioners' Appendix, A. 14).

The Fourth Circuit's decision below was properly based on Middlesex and Pennhurst, and there is no need for this Court to grant a writ of certiorari to restate the well-established distinction between the Cort v. Ash test for an implied private right of action and the Pennhurst and Middlesex tests for a right of action under 42 U.S.C. § 1983.

II. HUD'S IMPLEMENTING REGULATIONS DO NOT VEST IN PUBLIC HOUSING TENANTS RIGHTS SUFFICIENT TO ENFORCE UTILITY ALLOWANCE GRIEVANCES IN FEDERAL COURT UNDER § 1983.

A review of the policy underlying the Housing Act of 1937, reveals that HUD regulations promulgated from time to time pursuant to the Act do not vest in public housing tenants "rights" sufficient to enforce utility allowance grievances in federal court under § 1983.

The Act expressly declares:

> It is the policy of the United States to promote the general welfare of the Nation by employing its funds and credit, as provided in this Act, to assist the several States and their political subdivisions to remedy the unsafe and unsanitary housing conditions and the acute shortage of decent, safe and sanitary dwellings for families of lower income . . . .

42 U.S.C. § 1437 (1981) (emphasis added). This broad declaration

of policy establishes the Act's primary purpose of providing direct financial incentives to the States and their local agencies in order to increase and improve the housing stock available to lower income tenants. This purpose was properly recognized by the Fourth Circuit. The court found the indirect benefits conferred on lower income tenants by the Act's voluntary federal-state funding scheme insufficient to vest tenants with substantive, enforceable rights. (Petitioners' Appendix, A. 5) Indeed, Pennhurst makes clear that even where a statute may expressly state that individuals benefited by legislation have certain "rights" under the statute, if such rights are nonspecific or hortatory they cannot be enforced under § 1983. Certainly, the hortatory policy language of § 1437 provides Petitioners no specific rights to housing or free electricity. See Perry v. Housing Authority of Charleston, 664 F.2d 1210, 1217 (4th Cir. 1981).

In order to establish their "right" to free electricity, Petitioners rely on the language of 42 U.S.C. § 1437a, which instructs HUD as to the income levels that public housing tenants must meet to be eligible for public housing and which directs HUD as to the amount of rent that these tenants may be charged for their housing. The Housing Act, however, does not present the rent level nor the eligibility criteria as "rights" of housing tenants, but rather as directives to HUD. Furthermore, the Housing Act does not provide for, nor even mention, the availability of utility allowances to public housing tenants. Such allowances are purely creations of HUD.[5] 24 C.F.R. §§ 865.470-.482 (1980), superceded by 24 C.F.R. §§ 965.470-.480 (1985).

There is no express or implied right to specific utility allowances in the Housing Act sufficient to entitle tenants to a § 1983 right of action under Pennhurst. Likewise, no such

[5]Indeed, the fact that HUD could, without congressional approval, rescind the regulations relied on by Petitioners is evidence that Congress did not intend to provide tenants a "right" to utility allowances enforceable under § 1983.

"right" may be implied from the language or framework of HUD regulations. Congress has granted HUD wide latitude in the implementation and enforcement of housing regulations. Nowhere is HUD's exercise of discretion more apparent than in the field of utility allowances. HUD maintains the discretion not only to set utility allowance guidelines, but also the discretion under its regulations and its Annual Contributions Contracts ("ACCs") to audit, evaluate and determine whether PHA utility allowance rates are in compliance with HUD directives. See 24 C.F.R. § 965.473(d)(1985); ACC §§ 311 (audits) 507-08 (governmental remedies in event of breach). This broad agency discretion is particularly vital under a complex federal-state funding scheme. It provides HUD with the flexibility to implement an ongoing review process and permits the agency to engage in continuing dialogue with the States and tenants, issuing directives to them and listening to their comments and complaints with regard to the feasibility -- or lack thereof -- of Department regulations. HUD's policymaking and enforcement authority would be severely undermined if the regulatory process could be circumvented by tenants bringing suit in federal court under § 1983 to redress their individual grievances concerning the implementation and interpretation of HUD guidelines.[6]

III. CONGRESS DID NOT INTEND ROUTINE PUBLIC HOUSING TENANT-LANDLORD DISPUTES TO BE LODGED IN FEDERAL COURTS WHENEVER SUCH DISPUTES MIGHT FINANCIALLY AFFECT TENANTS.

The Fourth Circuit correctly recognized that it would be impractical for federal courts to review and calculate the complex and highly technical regulatory allowance scheme created

[6]Because utility allowance regulations are highly controversial and historically have engendered a significant amount of comment from PHAs and tenant groups, see 49 Fed. Reg. 31401 (Aug. 7, 1984), a continuing process of comment and revision is necessary to effectively respond to the various parties' interests. Indeed, the interim rules upon which this suit is based were rejected by HUD as a result of this fine-tuning process of ongoing comment and review, which resulted in regulations that Petitioners concede are "different in their procedural and substantive requirements" from the initial interim guidelines. (Petition, p. 5). If tenants are to be vested with rights under interim regulations cognizable under § 1983, there is a danger that courts may enforce literally that which HUD intends to be part of the give and take of the rulemaking process.

by HUD: "[W]e consider it highly unlikely that Congress intended federal courts to make the necessary computations regarding utility allowances that would be required to adjudicate individual claims of right."[7] (Petitioners' Appendix, A. 7). Implicit in the court's finding is a recognition of the strain that would be placed on our federal courts if public housing tenants are deemed possessed of rights cognizable under § 1983 whenever a tenant-landlord dispute may have an economic impact on a public housing tenant. Clearly, if tenants of public housing are afforded a right to free electricity enforceable under § 1983, federal courts will be deluged with highly individualized landlord-tenant disputes of a nature traditionally and properly left to the jurisdiction of the state courts. In the present setting, for example, a federal court would have to analyze the consumption habits and utility allotments of over 1100 tenants.

The Fourth Circuit correctly noted that the framework of the Housing Act and HUD regulations establishes that the enforcement of the utility allowances is better left to HUD than to the federal courts. (Petitioners' Appendix, A. 6). Congress has charged HUD with the responsibility of monitoring the PHAs' implementation of HUD regulations contained in Annual Contributions Contracts:[8]

> Under the [Housing Act] the Secretary performs extensive audits to verify the authorities' compliance with the conditions of the ACC, and HUD is authorized, as contract promisee, to enforce compliance by the most drastic possible means: termination of the federal subsidies under the contract.

(Petitioners' Appendix, A. 6) (quoting Phelps v. Housing Authority of Woodruff, 742 F.2d 816, 821 (4th Cir. 1984). In addition to HUD's power to force compliance with its directives under the ACC, Congress has specifically mandated that each public housing agency receiving federal assistance under the Housing Act establish and implement a grievance procedure for tenant disputes. 42 U.S.C. § 1437d(k) (1985). Thus, potentially costly and divisive tenant-management disputes can be resolved administratively, enabling the PHA to manage the day-to-day operation of the housing project with a minimum of outside interference.

In reviewing the framework of the Housing Act, placing special emphasis on HUD's power under the ACC, the Fourth Circuit concluded that Congress intended to foreclose private enforcement of the Act by public housing tenants under § 1983. (Petitioners' Appendix, A. 6). Any other finding would flood federal courts with landlord-tenant disputes involving highly technical computations and would disrupt agency authority in a field where Congress has granted HUD broad discretion.

IV. THE DECISIONS OF CIRCUIT COURTS CITED BY PETITIONERS TO ESTABLISH A CONFLICT ARE DISTINGUISHABLE FROM THE CASE DECIDED BY THE FOURTH CIRCUIT ON BOTH MATTERS OF LAW AND FACT.

The Fourth Circuit in this case determined that tenants of low-cost housing have no "right" to free electricity enforceable under § 1983. In challenging the Fourth Circuit's resolution of this question, Petitioners rely on several circuit court decisions in an effort to establish a conflict among the circuits. In fact, there is no significant, substantive conflict warranting this Court's discretionary review. The cases cited by Petitioners as evidence of a conflict are distinguishable from

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[7] Under the now superceded regulations upon which this suit is based, 24 C.F.R. § 865.476 (1980), utility allowance calculations involved an analysis of prior consumption tables and rates in similarly-constructed projects. In addition, the regulations permitted a PHA to make substantial surcharges before it was required to recalculate or review its utility allowance schedule. 24 C.F.R. § 865.480(b) (1980). HUD's new revised guidelines set out a similarly complex calculation scheme. See 24 C.F.R. § 965.476 (1985). The complexity of the regulations, and their highly flexible nature, establish that they were not intended to be specific mandates enforceable under § 1983.

[8] RRHA, like all housing authorities participating in federal low-cost housing programs, operates its low-income projects with federal subsidies pursuant to an Annual Contributions Contract. The ACC provides that if RRHA breaches any of its obligations under the Contract, HUD has the "right . . . to maintain any and all actions at law or in equity against the Local Authority to enforce the correction of any such default or to enjoin any such default or breach." HUD Annual Contributions Contract § 508.

the instant case on matters of law as well as fact.[9]

Petitioners erroneously rely on Beckham v. New York City Housing Authority, 755 F.2d 1074 (2d Cir. 1985), for the proposition that the Housing Act creates in tenants of low-cost housing an enforceable right to specific utility allowances created by HUD regulation. In Beckham, tenants of HUD-subsidized housing challenged the local PHA's policy of increasing the rent of tenants who fail to recertify their income and family composition in a timely manner. The tenants claimed that the PHA's policy violated § 1437a(a)(1) of the Housing Act, which requires that rent charged on assisted units be "30 per centum of the family's adjusted income . . . ." Thus Beckham is a rent case brought under § 1983 to vindicate tenants' claimed statutory "right" to specific rent limits provided in the express terms of the Act. In the case before the Fourth Circuit, however, Petitioners' claimed "right" is not based on a specific statutory "right," but rather is derived from a highly complex regulatory scheme created solely by HUD to govern the calculation of certain tenant utility allowances. This regulatory scheme does not create rights cognizable under the "and laws" language of § 1983.[10]

Petitioners have also cited Samuels v. District of Columbia, 770 F.2d 184 (D.C. Cir. 1985), as evidence of a conflict. In Samuels, tenants of low-cost public housing brought a § 1983 action seeking implementation of the administrative grievance

[9]Indeed, Pietroniro v. Borough of Oceanport, 764 F.2d 976 (3rd Cir. 1985), turns on facts so incongruous to those of the case before the Fourth Circuit that it may be dismissed out of hand. The Pietroniro decision involves a corporation's § 1983 claim for damages and declaratory and injunctive relief under the Housing Act of 1949, 42 U.S.C. § 1455(c)(1) and the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. § 4625. Nowhere in that case is the question of public housing tenants' § 1983 right of action for violations of regulatory utility limitations or the Housing Act of 1937 implicated.

[10]Moreover, although the circuit court assumed jurisdiction of the Beckham tenants' rent claim under § 1983, the court determined the action of the PHA did not violate the rent provisions of § 1437a. 755 F.2d at 1079-80. In reaching this conclusion, the Second Circuit relied on the very policies of efficient management of housing programs and effective use of limited housing assistance funds that underlie the Fourth Circuit's opinion in the instant case.

procedure expressly required by the Act, 42 U.S.C. § 1437d(k) (1985). Regulations establishing the grievance mechanism were before the court only as part of the comprehensive remedial scheme mandated by the Act. The court incorporated these regulations, the contents of which are expressly defined by the Act, into its decision that the tenants had a § 1983 remedy for the PHA's violation of § 1437d(k). The circuit court concluded that the "and laws" clause of § 1983 includes "at least those federal regulations adopted pursuant to a clear congressional mandate that have the full force and effect of law." 770 F.2d at 199.

Even if it is assumed only for the purpose of argument that the D.C. Circuit's reading of § 1983 is correct, Petitioners' alleged "right" to free electricity is founded on a regulatory scheme very different from the congressionally-mandated, specifically-defined grievance regulations in Samuels. Unlike the implementing regulations adopted pursuant to § 1437d(k), the utility allowance regulations relied on by Petitioners were not promulgated in response to a statutory directive. Nowhere in the Housing Act does Congress require that electricity be provided to tenants of public housing.[11]

Petitioners rely on the Sixth Circuit's decision in Howard v. Pierce, 738 F.2d 722 (6th Cir. 1984), to establish, by analogy, a § 1983 right of action vested in public housing tenants under the Housing Act. Howard, however, holds only that tenants may have an implied right of action against HUD (not a local PHA) under 42 U.S.C. § 1437a. 738 F.2d at 730-31. The court's decision thus supports the Fourth Circuit's conclusion that HUD, and not RRHA, is the party to which Petitioners must turn to obtain federal enforcement of the Housing Act and its

[11]Moreover, Samuels involves a systematic deprivation of a comprehensive enforcement scheme provided by the Act. The housing authority's refusal to implement the grievance procedure established by § 1437d(k) foreclosed a fundamental avenue of relief available to tenants. In such circumstance, a § 1983 right of action may necessarily lie to enforce the statute's remedial scheme. In the instant case, the Annual Contributions Contract and the grievance procedure established in § 1437d(k) are available to Petitioners as proper, effective remedies for their grievance in this case.

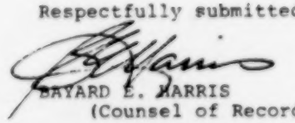
regulations. Moreover, Petitioners have gone to great lengths to establish that the Cort v. Ash, 422 U.S. 66 (1975), implied right of action inquiry is independent of the § 1983 question. Petitioners, however, cite Howard to argue that evidence of an implied right of action is evidence of a § 1983 right of action. Paradoxically, Petitioners also expressly disclaim any reliance on a purported implied private right of action. The Fourth Circuit properly recognized the tests as distinct, as has been established by decisions of this Court. See Middlesex County Sewerage Authority v. National Sea Clammers Ass'n, 453 U.S. at 19.

Petitioners also cite as evidence of a potential conflict cases pending in the Eleventh Circuit, Brown v. Housing Authority of McRea, No. 85-8186 (11th Cir.), and Nelson v. Greater Gadsden Housing Authority, 85-7320 (11th Cir.), in which the a... ability of a § 1983 private right of action to tenants under the HUD utility regulations is to be determined. With no decision as of yet rendered in either case, Petitioners' claim that these actions may be a basis of a conflict is purely speculative and thus untimely. This Court should not prematurely supplant the role of the federal circuit courts in reviewing these issues.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,



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42 U.S.C. § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.

42 U.S.C. § 1437. Declaration of policy

It is the policy of the United States to promote the general welfare of the Nation by employing its funds and credit, as provided in this Act, to assist the several States and their political subdivisions to remedy the unsafe and unsanitary housing conditions and the acute shortage of decent, safe, and sanitary dwellings for families of lower income and, consistent with the objectives of this Act [42 USCS §§1437-1437j], to vest in local public housing agencies the maximum amount of responsibility in the administration of their housing programs. No person should be barred from serving on the board of directors or similar governing body of a local public housing agency because of his tenancy in a lower income housing project.

42 U.S.C. § 1437a. Rental payments; definitions

(a) Dwelling units assisted under this Act shall be rented only to families who are lower income families at the time of their initial occupancy of such units. Reviews of family income shall be made at least annually. A family shall pay as rent for a dwelling unit assisted under this Act (other than a family assisted under section 8(o)[42 USCS § 1437f(o)]) the highest of the following amounts, rounded to the nearest dollar:

(1) 30 per centum of the family's monthly adjusted income;

(2) 10 per centum of the family's monthly income; or

(3) if the family is receiving payments for welfare assistance from a public agency and a part of such payments, adjusted in accordance with the family's actual housing costs, is specifically designated by such agency to meet the family's housing costs, the portion of such payments which is so designated.

* * *

42 U.S.C. § 1437d(k).

(k) The Secretary shall by regulation require each public housing agency receiving assistance under this Act to establish and implement an administrative grievance procedure under which tenants will--

(1) be advised of the specific grounds of any proposed adverse public housing agency action;

(2) have an opportunity for a hearing before an impartial party upon timely request within any period applicable under subsection (1);

(3) have an opportunity to examine any documents or records or regulations related to the proposed action;

(4) be entitled to be represented by another person of his choice at any hearing;

(5) be entitled to ask questions of witnesses and have others make statements on his behalf; and

(6) be entitled to receive a written decision by the public housing agency on the proposed action.

An agency may exclude from its procedure any grievance concerning an eviction or termination of tenancy in any jurisdiction which requires that, prior to eviction, a tenant be given a hearing in court which the Secretary determines provides the basic elements of due process.

24 C.F.R. § 865.476 (1980). Data upon which allowances shall be based (PHA-Furnished and Tenant-Purchased Utilities) (superceded by 24 C.F.R. §965.476 (effective October 2, 1984)).

(a) Where records are available for the particular housing. The portion of the Allowance applicable to each Utility shall be based upon the consumption records (consumption and cost records in the case of Tenant-Purchased Utilities) for the particular structure type category (§ 865.474) for the most current three-year period. Because of seasonal variations in the use of Utilities, each year shall consist of 12 consecutive months. If records are not available for a three-year period, the PHA shall use records for the most current two-year period, or if such records are unavailable, for the most current one-year period. If records are not available for the particular housing category for the entire year, records of the most comparable PHA housing will be used. Allowances based on records for only a one-year period should be adjusted for normal weather conditions.

(b) Where records are not available for the particular housing. For new housing or existing housing for which adequate records covering a full year are not available, the Allowances shall be based on records for the most comparable PHA housing in the area as to construction type and size of units, utility combinations, climatic conditions, and types of equipment. Utilities data for comparable projects shall be obtained from the records of PHAs, the Utility suppliers or the HUD Field Office. See also § 865.474(b) with respect to scattered site dwelling units.

(c) Source data for Tenant-Purchased Utilities. In the case of Tenant-Purchased Utilities, the PHA must establish a special procedure for obtaining the consumption data for those dwelling units. The PHA shall utilize a method which it finds best taking into consideration practicability, reliability, and administra-

tive cost. Such methods may include, for example, arrangements with Utility suppliers to furnish consumption data to the PHA (without identification of the users, if the Suppliers so prefer); meter readings by the PHA; having the tenants furnish copies of their utility bills (or making them available for copying) in connection with the payments of their monthly rents.

24 C.F.R. § 865.480 (1980). Review and revision of allowances (superceded by 24 C.F.R. § 965.478 (effective October 2, 1984)).

(a) Revisions by Reason of Inadequate Data Base (for PHA-Furnished Utilities). Where the data base for establishment of the Allowance consisted of less than three years for the particular housing, the PHA shall review the Allowances at the end of each year, taking into consideration the data for the particular housing, until an Allowance based on records for three years for the particular housing has been established.

(b) Allowance for PHA-Furnished Utilities. (1) At the end of each quarterly or other billing period, in connection with the determination of surcharges, the PHA shall determine the number and percentage of tenants who are subject to surcharge. When the PHA finds that the percentage of surcharge cases is more than 25 percent of a category and there is no reason of a non-recurring nature (such as weather extremes) to account for this, the PHA shall review the consumption data and if appropriate, establish a revised Allowance in accordance with § 865.477.

(2) No separate revisions in the allowance by reason of changes in Utility rates are necessary because the PHA is billed directly by the Utility suppliers at their current rates and, by the same token, the PHA uses current rates in computing surcharges.

* * *

Annual Contributions Contract.

Sec. 5. Covenant to Develop and Operate

(1) The Local Authority shall develop each Project being or to be developed and shall operate all Projects covered by this Contract in compliance with all provisions of Contract and all applicable provisions of the Act and applicable provisions of state and local law.

Sec. 311. Access to Records and Projects; Audits

(A) The Government and the Comptroller General of the United States, or his duly authorized representatives, shall have full and free access to the Projects and to all the books, documents, papers, and records of the Local Authority that are pertinent to its operations with respect to financial assistance under the Act, including the right to audit, and to make excerpts and transcripts from such books and records.

* * *

Sec. 507. Definition of Substantial Breach

* * *

(8) If there is any default or breach by the Local Authority in the performance or observance of any term, covenant, or condition of this Contract other than the defaults or breaches enumerated in Sec. 506 or in subsections (1) through (7) of this Sec. 507; and if such default or breach has not been remedied within thirty days (or such longer period as may be set by the Government) after the Government has notified the Local Authority thereof.

Sec. 508. Other Defaults or Breaches, and Other Remedies

* * *

(B) If the Local Authority shall at any time be in default or breach, or take any action which will result in a default or

breach, in the performance or observance of any of the terms, covenants, and conditions of this Contract, then the Government shall have, to the fullest extent permitted by law (and the Local Authority hereby confers upon the Government the right to all remedies both at law and in equity which it is by law authorized to so confer) the right (in addition to any rights or remedies in this Contract specifically provided) to maintain any and all actions at law or in equity against the Local Authority to enforce the correction of any such default or breach or to enjoin any such default or breach.

No. 85-5915

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1985

BRENDA E. WRIGHT, GERALDINE H. BROUGHMAN, and SYLVIA P. CARTER individually and on behalf of all persons similarly situated

Petitioners

v.

CITY OF ROANOKE REDEVELOPMENT AND HOUSING AUTHORITY

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

I. THAT THE FOURTH CIRCUIT'S DECISION REDUCES HUD REGULATIONS TO UNENFORCEABLE "GUIDELINES" IS A REASON FOR THIS COURT TO GRANT RATHER THAN DENY REVIEW.

The Authority's brief in opposition to the writ of certiorari makes explicit what is only implicit in the Court of Appeals' treatment of this case: the view that duly published regulations of the Department of Housing and Urban Development are not law at all. The Authority is concerned that courts may take such regulations "literally" (brief in opposition p. 7, fn.6). Actually, says the Authority, regulations such as those in question here are only issued so that HUD may "engage in continuing dialogue with the States and tenants," and listen to "their comments and complaints with regard to the feasibility - or lack thereof - of Department regulations." HUD's authority would be severely undermined if tenants could actually hold local housing officials to what HUD has promulgated. (Brief in opposition p. 7)

The Authority's characterization is only slightly more extreme than that of the Court of Appeals itself, which described HUD as the sole "enforcer" of the Housing Act, speculating that consolidated enforcement responsibility

> was a practical legislative attempt to protect the limited resources available to the government. In other words, HUD can act as a screening body and focus its attention on those housing developments sorely needing attention without risking the depletion of funds available for redressing violations of the Housing Act.

(Petitioners' appendix A6, n.7).

In short, having created clear regulations describing what local authorities must do to comply with the mandate of Congress, HUD may disregard compliance, and in fact is to be expected to do so in order that the agency can thereby concentrate on more important matters. This view of the Code of Federal Regulations and the unlimited discretion of HUD is a radical departure which goes far beyond a recognizable counsel of judicial restraint. Law is law, and not just the parts we

like. HUD regulations are the law, Thorpe v. Housing Authority of Durham, 393 U.S. 268, 274-76 (1969), just like HEW's AFDC regulation in Batterton v. Francis, 432 U.S. 416, 425-26 (1977) or the Armed Services Procurement Regulation in Paul v. United States, 371 U.S. 245, 252-55 (1963). And not only housing authorities and tenants but HUD as promulgating agency is bound by its own regulations while in effect, Service v. Dulles, 354 U.S. 363 (1957).

It should come as no surprise that a blatant violator of regulations should have a low opinion of the regulations violated; but it is surprising that the Authority would expect the courts to find them less than binding. Surely the very first holding that HUD has exclusive jurisdiction over all questions arising under the Housing Act of 1937 should not arise from a case manifesting the unwillingness of the agency to perform the task.[1] Here violation of those regulations not only shows the inadequacy of HUD oversight but directly imperils the critical Congressional policy of the Brooke Amendment rent limits. No abstract discussion of the nature and enforcement of agency regulations, however, can excuse the basic failing of the Fourth Circuit's opinion: its utter lack of analysis of the Brooke Amendment and implementing regulations. The disturbing tendencies in the announced principles of decision rise to alarming and radical error when applied so casually to this statutory context. The brief in opposition only emphasizes the importance of the case and of this Court's review.

II. THIS CASE IS NOT AN AN INDIVIDUAL GRIEVANCE ABOUT FREE ELECTRICITY, BUT CONCERNS A SWEEPING DISREGARD OF STATUTORY MANDATE.

This case cannot fairly be characterized as a quest for "free electricity." (Opposing brief at 6,8,9). The 1100 affected tenant families pay up to the Brooke Amendment limit in rent, and the rent must include a reasonable allowance of utilities. The balance of cost for both rent and utilities is subsidized to the Authority by HUD. There is nothing free to anyone; the question is whether the Authority can charge tenants beyond the Brooke Amendment limits, and retain the illegally extracted charges. Neither court below, it should be noted, has accepted the Authority's mislabeling of the issue as "free electricity."

Nor has the District Court or the Court of Appeals accepted the Authority's attempt to characterize this case as an "individual grievance" (brief in opposition, pp. 6, 7-9). Both the initial complaint and every shred of fact in evidence support the tenants' assertion that the Authority's whole system of utility allowances defies the Brooke Amendment, the HUD regulations, and the Authority's lease. The District Court recognized the case as appropriate for class treatment on both grounds of common law and fact (appendix A26).

The Authority (opposing brief n. 9) would consign these 1100 tenant families to the individual administrative grievance process operated by the Authority, overlooking the specific finding by HUD that this grievance process is unavailable for challenges to utility allowances. HUD Regulation Comments, 49 Fed. Reg. 31399, 31407 (August 7, 1984). In the alternative, the Authority argues that 1100 individual claims involving highly technical computations and construction of federal regulations are "landlord-tenant disputes of a nature traditionally and properly left to the jurisdiction of the state courts." (Opposing brief p.8). The shortcomings of this approach are self-evident, whether it is viewed as a question of federalism, judicial efficiency, or common sense.

This case, in short, has nothing to do with highly individualized grievances, but rather with uniform and obstinate Authority dereliction. The judicial treatment to date imperils the key Congressional mandate of the entire

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[1] As petitioners pointed out in their opening brief (p.7), HUD has not asserted a sole enforcement role concerning Brooke Amendment and utilities violations.

public housing program, and a vast number of the poorest people in the nation. Where magnitude of error is so compounded by magnitude of effect, this Court's review is thoroughly warranted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of this reply to the brief in opposition was served by deposit in the United States mail, first class postage prepaid, addressed to Bayard E. Harris, Esq., counsel for respondent, Woods, Rogers & Hazelgrove, P. O. Box 720, Roanoke, Virginia 24004, on December 30, 1985.

Of counsel for petitioners

(5)

No. 85-5915

In the Supreme Court of the United States

OCTOBER TERM, 1985

BRENDA E. WRIGHT, ET AL., PETITIONERS

v.

CITY OF ROANOKE REDEVELOPMENT AND HOUSING AUTHORITY, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED NOVEMBER 25, 1985
CERTIORARI GRANTED JANUARY 21, 1986

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

Civil Action No. 82-908

BRENDA E. WRIGHT, GERALDINE H. BROUGHMAN and SYLVIA P. CARTER, individually and on behalf of all persons similarly situated, PLAINTIFFS

v.

CITY OF ROANOKE REDEVELOPMENT AND HOUSING AUTHORITY, DEFENDANT

CLASS ACTION COMPLAINT

PRELIMINARY STATEMENT

Plaintiffs are public housing tenants living in projects owned and operated by the City of Roanoke Redevelopment and Housing Authority. Federal law limits the portion of tenant incomes which can be charged as rent and subsidizes housing authority operations to make the subsidy possible. For the limited rent, public housing agencies are required to furnish a reasonable allowance of electrical utility service as well as the dwelling unit. For electrical consumption in excess of their allowances, tenants are required to pay quarterly surcharges.

The plaintiffs claim that the Housing Authority has set the utility allowance unreasonably low, and failed to revise them, so that the Authority may collect greater excess consumption surcharges from the majority of tenants. They claim that the Housing Authority has dis-

regarded federal law describing how such allowances are to be maintained. They also claim that the allowances are in violation of their leases with the authority. For themselves and other public housing tenants, the plaintiffs ask that the Housing Authority be ordered to comply with the law and its own leases and refund to tenants the charges illegally imposed in the past.

JURISDICTION

1. This court has jurisdiction under 28 U.S.C. §§ 1331 and 1343(3) and (4) for redress under 42 U.S.C. § 1983 of a deprivation of rights, privileges, or immunities secured by the constitution and laws of the United States; and under 28 U.S.C. § 1337 for claims arising out of interstate commerce. The court also has pendent jurisdiction over any state law aspects of the questions here presented.

PARTIES

2. Plaintiffs Brenda E. Wright, Geraldine H. Broughman and Sylvia P. Carter all live with their families in public housing projects owned by defendant Authority in the city of Roanoke.

3. Defendant City of Roanoke Redevelopment and Housing Authority ("the Authority") is a political subdivision of the Commonwealth of Virginia created under Code of Virginia (1950), § 36-4. It is a public housing agency as defined at 42 U.S.C. § 1437(a)(6). The Authority administers public housing in the City of Roanoke, Virginia.

4. Defendant Authority was at all relevant times operating under color of state law.

CLASS

5. The named plaintiffs bring the action on their own behalf and, pursuant to Rule 23(a) and (b)(2) and (b)(3) of the Federal Rules of Civil Procedure, on behalf of all other persons similarly situated. The class is comprised of all persons who have been or will be surcharged

for consumption of electric utility service in excess of allowances established by the defendant Authority.

6. The requirements of Rule 23 are met in that

(a) the class is so numerous that joinder of all members is impracticable. The exact number of persons in the class is not presently known to plaintiff, but can be adduced through discovery. The class will be drawn from most families now or formerly residing in approximately 1103 units of public housing in 7 projects in the City of Roanoke.

(b) The common issue of fact with regard to the class is whether defendant Authority has properly calculated and maintained a schedule of utility allowances. The issue of law common to the class is the adequacy of defendant Authority's practice in light of federal law and in the light of the provisions of a lease form used throughout the Authority regarding utility allowances.

(c) The claims of the representative parties are typical of the claims of the class; the named plaintiffs' interests are not antagonistic to the claims of other members, but in fact, their action if successful will protect the rights and interests of other members of the class.

(d) The representative parties will fairly and adequately protect the interest of the class.

(e) Defendant Authority has by its policy and practice acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive and declaratory relief with respect to the class as a whole.

(f) Common questions of law and fact as to the legality of the Authority's utility policy predominate over questions of computation of claims affecting individual members, which can be easily determined by reference to Authority records of individual tenant consumption. A class action is the superior and the only available method for the fair and efficient adjudication of the controversy.

STATUTORY AND REGULATORY SCHEME

7. The public housing projects owned by defendant Authority were built and are operated with federal

subsidy under the National Housing Act of 1937 as part of the national effort to assure the poor a supply of decent, safe, and sanitary housing.

8. Because of the limited ability of low-income families to pay fair market rentals while meeting their other essential needs, the Congress by the "Brooke Amendment" restricted the portion of rent which could be charged such families by public housing agencies ("PHAs") to 25% of their adjusted income, 42 U.S.C. § 1437(a)(1).

9. The Secretary of the United States Department of Housing and Urban Development ("the Secretary"), in exercise of his authority to interpret and implement the law, has at 24 C.F.R. § 860.403(a) and (i) defined rent for Brooke Amendment purposes to include charges for use of the dwelling accommodation and equipment, services, and "reasonable amounts of utilities determined in accordance with the PHA's schedule of allowances for utilities supplied by the project." Charges for utility consumption in excess of the PHA allowance are not included, and therefore not subject to the Brooke Amendment limits implemented by 24 C.F.R. § 860.405.

10. The establishment of utility allowances by defendant Authority and other PHAs is governed by the Secretary's regulations at 24 C.F.R. § 865.470 *et seq.*, promulgated September 9, 1980.

11. Those regulations required all PHAs to establish allowances for PHA furnished utilities and to include with their rent schedules the allowances and a statement of items of major equipment whose utility consumption requirements were included in determining the amounts of the allowances. 24 C.F.R. § 865.473.

12. The allowances for PHA furnished utilities were also required to be calculated to be sufficient to meet the needs of 90% of the units in each category of dwelling unit and size. This calculation was to be based on past consumption records. 24 C.F.R. § 865.477.

13. Thereafter, the PHA was to review the number and percentage of tenants during each billing period who

were subject to surcharge for exceeding the allowances. When the percentage of surcharged tenants exceeded 25% of a category, the PHA was to review and revise the allowances as appropriate. 24 C.F.R. § 865.480.

COMMON FACTS

14. Plaintiffs and all tenants in the Authority's housing projects (except for purchase and elderly projects) have entered the same form of lease upon a form required by the Authority for the last several years.

15. Paragraph 4 of the Authority's standard lease provides:

> Utilities: Management Agent agrees to furnish at no charge to the Resident the following utilities as reasonably necessary: hot and cold water, gas for cooking, and *electricity for lighting and general household appliances* and heat at appropriate times of the year, and also range and refrigerator. Resident will be required to pay for all excess consumption of utilities above the monthly allocated amount as developed by the Authority and determined by the individual check meter servicing the leased unit. The schedule of allocations and charges for excess consumption is posted on the bulletin board of each Housing Development office. [emphasis added]

16. Neither the standard lease nor the schedules maintained by the Authority define or limit "general household appliances" for which the Authority obligates itself to furnish electricity as reasonably necessary.

17. Following promulgation of 24 C.F.R. § 865.470 *et seq.*, defendant Authority did not revise tenant utility allowances in accordance with the regulations but continued to rely upon an earlier schedule of allowances dating back to April 1, 1977.

18. Defendant Authority did not include with its rent schedules made available to tenants or submitted to HUD a statement of items of major equipment whose utility

consumption requirements were included in determining the amounts of the allowances.

19. Defendant Authority did not attempt to calculate PHA-furnished utilities in amounts reasonably necessary for lighting and general household appliances and heat at appropriate times of year, and also range and refrigerator.

20. Defendant Authority did not attempt to calculate PHA furnished utilities so that the resulting allowances would be sufficient to meet the needs of 90% of the units in each category of dwelling unit and size.

21. Defendant Authority did not review the number and percentage of tenants surcharged during each billing period to determine if they exceeded 25% of a category and did not consider adjustments of the allowances upon that information.

22. Defendant Authority did not re-establish the utility allowances for its tenants until April 1, 1982, and at that time did so in disregard of the requirements of 24 C.F.R. § 865.470 *et seq.*

23. As a result of this practice defendant Authority has regularly collected and continues to collect utility surcharges not from a limited number of excess consumers, but rather from the majority of its tenants.

24. As a result of this practice defendant Authority collected and continues to collect in excess of $50,000 annually of unauthorized surcharges.

INDIVIDUAL FACTS

25. Plaintiff Brenda E. Wright and her 2 children have lived in the Authority's Lansdowne Park project for 11 years. She pays rent of $169 per month from her earnings of approximately $128 per week as a dietary aide at Community Hospital.

26. Ms. Wright was surcharged $33.53 in October 1982 by the Authority for excess utility consumption. This and previous charges imposed a serious strain upon her limited resources.

27. Plaintiff Geraldine Broughman has lived with her 5 minor children in the Authority's Lansdowne Park for over four years. She pays the Authority monthly rental of $89 from her public assistance. She is in a work training program which she hopes will qualify her for a good job.

28. For every quarter she can remember, Mrs. Broughman has been surcharged by the Authority for excess utility consumption. She is not aware of any of her neighbors in the project who have escaped similar surcharges.

29. For the first three quarters of 1982, Ms. Broughman was surcharged $44.82, $62.15 and over $69 respectively for excess utility consumption. These charges impose a serious strain upon her limited resources and she must often pay them over a period of several months rather than immediately when billed.

30. Plaintiff Sylvia P. Carter and her 2 children moved into the Authority's project known as Jamestown Place in February 1982. She pays rent of $48.00 from her income of $255 per month in public assistance.

31. Mrs. Carter was surcharged $44.28 in October 1982 by the Authority for excess utility consumption. This and previous similar charges impose a serious strain upon her limited resources.

32. If the schedule of utility allowances provided by the Authority had indeed furnished electricity for "general household appliances" in accordance with their leases, the named plaintiffs would have paid less surcharge or none at all.

33. If the schedule of utility allowances provided by the Authority had been revised in accordance with the requirements of federal regulation, the named plaintiffs would have paid less surcharge or none at all.

FIRST CLAIM

34. The practice of defendant Authority in using an outdated schedule of utility allowances and failing to

revise and maintain the schedule in accordance with 24 C.F.R. § 865.470 *et seq.* violates those regulations.

35. Defendant Authority's practice of surcharging tenants for utility service which should have been included in their rent also constitutes violation of the Brooke Amendment limits of 42 U.S.C. § 1437a(1).

36. Defendant Authority's practice thereby has deprived and continues to deprive plaintiffs and the class they represent of benefits bestowed by federal law and regulation.

SECOND CLAIM

37. Defendant Authority's failure to furnish electrical utilities service reasonably necessary for lighting and general household appliances at no charge to tenants violates its obligation to plaintiffs and their class of tenant families under Paragraph 4 of its standard lease.

PRAYER FOR RELIEF

Plaintiffs respectfully request that this court:

(a) certify this action to proceed as a class action under Rule 23;

(b) declare the challenged practice of defendant Authority to be in violation of the Brooke Amendment, federal regulations, and the Authority's own tenant leases;

(c) require defendant Authority to recalculate the schedule of utility allowances in accordance with 24 C.F.R. § 865.470 *et seq.* so that not more than 10% of tenant families of each category and unit size will be surcharged for excess utility consumption in any quarter and so that electrical service reasonably necessary for general household appliances will be provided without surcharge;

(d) require defendant Authority to refund to plaintiffs and members of their class all surcharges previously collected;

(e) award plaintiffs their costs and attorney fees pursuant to 42 U.S.C. § 1988, to be paid to the Legal Aid Society of Roanoke Valley for application in its program of indigent representation.

BRENDA E. WRIGHT
GERALDINE H. BROUGHMAN
SYLVIA P. CARTER
By Counsel

LEGAL AID SOCIETY OF ROANOKE VALLEY
Counsel for Plaintiffs

by /s/ Henry L. Woodward
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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

Civil Action No. 82-0908

[Title Omitted in Printing]

ANSWER

Comes now the defendant, City of Roanoke Redevelopment and Housing Authority, by counsel, and for its Answer to plaintiffs' Complaint, states as follows:

(1) The preliminary statement requires no answer and, accordingly, defendant relies on its answer more specifically set out herein.

FIRST DEFENSE

(2) Defendant admits jurisdiction pursuant to 28 U.S.C. § 1343(3) and (4) but denies all other allegations contained in paragraph (1) of the complaint.

(3) The allegations contained in paragraphs (2), (3), and (4) are admitted.

(4) Defendant denies that this action should be certified as a class action and defendant denies each and every allegation contained in paragraphs (5) and (6) of the complaint.

(5) Defendant denies the allegations contained in paragraph (7) and (8) of the complaint.

(6) Defendant admits the express statutory language contained in paragraphs (9), (10), (11), (12), and (13) of the complaint but denies the conclusions of law required by the allegations contained therein and avers that these regulations are subject to interpretation and enforcement by the Secretary of Housing and Urban Development.

(7) Defendant admits the allegations contained in paragraphs (14) and (15) of the complaint.

(8) Defendant denies the allegations contained in paragraph (16) of the complaint except to the extent that the lease speaks for itself.

(9) The allegations contained in paragraphs (17), (18), (19), and (20) are denied.

(10) Defendant admits the allegations contained in paragraph (21) of the complaint.

(11) Defendant admits that it did not re-establish the utility allowances for its tenants until April 1, 1982, but denies the remaining allegations contained in paragraph (22) of the complaint.

(12) Defendant denies the allegations contained in paragraphs (23) and (24) of the complaint.

(13) Defendant admits that plaintiff Brenda E. Wright has lived in the Authority's Lansdowne Park project for 11 years and that she pays a rent of $169.00 per month, but defendant is without sufficient information to admit or deny the remaining allegations contained in paragraph (25) of the complaint.

(14) Defendant admits that Mrs. Wright was surcharged $33.53 in October, 1982, by the Housing Authority for excess utility consumption, but defendant is without sufficient information to admit or deny the remaining allegations contained in paragraph (26) of the complaint.

(15) Defendant admits that plaintiff Geraldine H. Broughman has lived in the Authority's Lansdowne Park project for over 4 years and that she previously paid the Authority a monthly rental of $89.00, but defendant is without sufficient information to admit or deny the remaining allegations contained in paragraph (27) of the complaint.

(16) Defendant is without sufficient information to admit or deny the allegations contained in paragraph (28) of the complaint.

(17) Defendant admits that for the first three quarters of 1982, Ms. Broughman was surcharged $44.82, $62.15 and over $69 respectively for excess utility con-

sumption, but defendant is without sufficient information to admit or deny the remaining allegations contained in paragraph (29) of the complaint.

(18) Defendant admits that plaintiff Sylvia P. Carter moved into the Authority's project known as Jamestown Place in February, 1982, and that she pays rent of $48.00, but defendant is without sufficient information to admit or deny the remaining allegations contained in paragraph (30) of the complaint.

(19) Defendant admits that Mrs. Carter was surcharged $44.28 in October, 1982, by the Housing Authority for excess utility consumption, but defendant is without sufficient information to admit or deny the remaining allegations contained in paragraph (31) of the complaint.

(20) Defendant denies the allegations contained in paragraphs (32), (33), (34), (35), (36), and (37) of the complaint.

(21) Defendant denies all allegations in the complaint not expressly admitted herein.

SECOND DEFENSE

(22) Defendant has entered into a lease with each tenant identified as part of the alleged class, which lease defines the rights of the parties respecting the furnishing of utilities and charges therefor. The alleged class members' rights are circumscribed by said lease, and alleged class members have waived and are stopped from asserting any claims inconsistent therewith.

Respectfully,

CITY OF ROANOKE REDEVELOPMENT AND HOUSING AUTHORITY

By /s/ Thomas T. Lawson
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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

[Title Omitted in Printing]

MOTION FOR JUDGMENT ON THE PLEADINGS

Pursuant to Rule 12(c) and (h)(2) of the Federal Rules of Civil Procedure, defendant City of Roanoke Redevelopment and Housing Authority (hereafter the Authority) moves for judgment on the pleadings in its favor and for its Motion states:

(1) The Complaint fails to state a cause of action under the National Housing Act of 1937, 42 U.S.C. § 1437, as no private right of action exists under that statute and enforcement depends solely on the action of HUD.

(2) The Complaint fails to state a cause of action pursuant to 42 U.S.C. § 1983 in that plaintiffs do not allege a deprivation of a Constitutional right or a right granted plaintiffs by the Housing Act of 1937.

(3) The Complaint fails to join an indispensable party within the meaning of Rule 19 in that the Department of Housing and Urban Development (HUD) is not named as a party despite the exclusive control of the regulatory enforcement scheme by that agency.

WHEREFORE, for the above reasons the defendant Authority moves the court to grant judgment in favor of the defendant and to dismiss the complaint and to grant defendant its costs and such other relief as the Court may deem proper.

CITY OF ROANOKE REDEVELOPMENT
AND HOUSING AUTHORITY

By /s/ B.E. Harris
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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

Civil Action No. 82-908

[Title Omitted in Printing]

MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 56(a) of the Federal Rules of Civil Procedures, plaintiffs move for partial summary judgment in favor of them and the plaintiff class as to the first claim of the complaint, specifically the liability of defendant City of Roanoke Redevelopment and Housing Authority for violation of the Brooke Amendment and regulations thereunder at 24 C.F.R. § 865.470 *et seq.*

As grounds of this motion plaintiffs will show that there exists no genuine issue as to any material fact relevant to this claim, and the plaintiffs and their class are entitled to judgment as a matter of law.

BRENDA E. WRIGHT *et al.*
By Counsel

LEGAL AID SOCIETY OF ROANOKE VALLEY
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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

Civil Action No. 82-0908

BRENDA E. WRIGHT, ET AL., PLAINTIFFS

vs.

CITY OF ROANOKE REDEVELOPMENT AND
HOUSING AUTHORITY, DEFENDANT

MEMORANDUM OPINION

By: James C. Turk, Chief District Judge

On December 8, 1982, Plaintiffs, who are tenants of public low-cost housing, filed suit in this court against their landlord, the City of Roanoke Redevelopment and Housing Authority[1] ("RRHA"). In their complaint, Plaintiffs alleged that RRHA violated the Brooke Amendment of the United States Housing Act of 1937, 42 U.S.C. § 1437(a) (1983), and its implementing regulations, 24 C.F.R. §§ 865.470-.482 (1983), in that it had set the utility allowances unreasonably low and failed to revise them, so that RRHA might collect greater excess consumption surcharges from the majority of tenants. They also claimed that RRHA had disregarded federal law prescribing how such allowances are to be maintained. The Brooke Amendment provides that public housing tenants be charged no more than twenty-five to thirty percent of

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[1] On August 10, 1983, this action was certified as a class action, the class being comprised of tenant families in seven projects of public housing in the City of Roanoke.

their adjusted income for rent, which by definition includes an established amount of utilities.[2] Plaintiffs based their claims for relief upon 42 U.S.C. § 1983 and the lease contracts between Plaintiffs and Defendant RRHA.

On May 14, 1984, Defendant RRHA moved for judgment on the pleadings, pursuant to Rules 12(c) and (h)(2) of the Federal Rules of Civil Procedure. In its motion, RRHA challenges the legal sufficiency of plaintiffs' cause of action. RRHA asserts that: 1) the plaintiffs have no private right of action under the Brooke Amendment and that enforcement depends solely on the action of the United States Department of Housing and Urban Development ("HUD"), 2) the Housing Act does not create any substantive rights which would allow the plaintiffs to proceed under § 1983, and 3) HUD is an indispensable party to the action and the plaintiffs' failure to join it mandates dismissal. Since matters outside the pleadings have been submitted to and considered by this court, the defendant's motion shall be treated as one for summary judgment and disposed of in accordance with Rule 56 of the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 12(c), 56.

I.

INTRODUCTION

In *Home Health Services, Inc. v. Currie*, 706 F.2d 497 (4th Cir. 1983), a provider of home health services brought suit against a physician and the state medical university for alleged violations of the Medicare Act, 42

[2] Gross rent is the amount of rent chargeable to a tenant for the use of the dwelling accommodation, equipment, . . . services, and Utilities not to exceed the Allowances for PHA-Furnished Utilities . . . . 24 C.F.R. § 865.472. Allowances for Public Housing Authority ("PHA")-Furnished Utilities represent the maximum consumption units (e.g., kilowatt hours of electricity) which may be used by a dwelling unit without a surcharge for excess consumption against the tenant. 24 C.F.R. § 470.

U.S.C. § 1395a (1983), and federal civil rights statutes. The Fourth Circuit Court of Appeals found that Home Health had no implied right of action under the Medicare Act, and went on to state that "the conclusion that Home Health has no right of action . . . under 42 U.S.C. § 1359a compels the conclusion that Home Health likewise has no cause of action under §§ 1983 and 1985." *Home Health*, 706 F.2d at 498.[3] Thus this court feels that under the Fourth Circuit's analysis, a determination of whether the plaintiffs have been deprived of "rights, privileges, or immunities" within the meaning of § 1983 [4] should begin with a determination of whether an implied right of action exists under the Brooke Amendment.

II.

PRIVATE RIGHT OF ACTION UNDER THE BROOKE AMENDMENT

In determining whether a private right of action may be implied from a statute when legislation does not provide expressly for such a remedy, a court must focus on congressional intent. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 377 (1982). Since 1975, the prevailing standard for determining whether Congress intended to imply such a right of action is that set forth in *Cort v. Ash*:

[3] The Fourth Circuit cited *Perry v. Housing Authority of City of Charleston*, 664 F.2d 1210, 1217-18 (4th Cir. 1981) as standing for this conclusion.

[4] 42 U.S.C. § 1983 provides, in relevant part, that:

> Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

> First, is the plaintiff "one of the class for whose especial benefit the statute was enacted" . . . that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? . . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? . . . And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal laws?

422 U.S. 66, 78 (1975) (citations omitted). Although later cases favored a somewhat different but related approach, *see, e.g., Transamerica Mortgage Advisor, Inc. (TAMA) v. Lewis*, 444 U.S. 11, 15-16 (1979); *Touche Ross & Co. v. Reddington*, 442 U.S. 560, 568 (1979), the Supreme Court has recently reaffirmed the use of the *Cort* analysis. *Daily Income, Inc. v. Fox*, 104 S.Ct. 831, 839 (1984).

The first inquiry under *Cort* is whether Congress intended to create a special class of beneficiaries which includes the plaintiffs, and, if so, whether Congress intended to confer federal rights upon such beneficiaries. In construing sections 1437(c) and 1441, two general policy sections of the Housing Act, the Fourth Circuit Court of Appeals determined that: "First, the purpose of the legislation was to help the states; second, the purpose in helping the states was ultimately to benefit low income families. Thus the legislation had two beneficiaries—states as direct beneficiaries and low-income families as indirect beneficiaries." *Perry v. Housing Authority of City of Charleston*, 664 F.2d 1210, 1213 (4th Cir. 1981). The *Perry* court also found that "[t]here is clearly no indication in the legislation or in [the] history [of the Housing Act] that Congress intended to

create in public housing tenants a federal right of action against their municipal landlords." *Id.*

The court, combining factors three and four of the *Cort* analysis, determined that:

> it would plainly be inconsistent with any legislative scheme in the federal legislation to imply a private cause of action where the legal right involved is one traditionally left to state law. It would be hard to find an area of the law in which the states have a greater interest or have had greater involvement than in the legal area of landlord-tenant.

Id. at 1216. Thus, the court held that there was no implied cause of action under the Housing Act against a local housing authority.

In applying the *Cort* analysis to the provisions of the Brooke Amendment, this court sees no reason to deviate from the conclusions reached by the Fourth Circuit in *Perry*. The Brooke Amendment provided, at the time this suit was filed:

> (a) Dwelling units assisted under this Act shall be rented only to families who are lower income families at the time of their initial occupancy of such units. A family shall pay as rent for a dwelling unit assisted under this Act the highest of the following amounts, rounded to the nearest dollar:
>
> 1) 30 per centum of the family's monthly adjusted income;
>
> 2) 10 per centum of the family's monthly income; or
>
> 3) if the family is receiving payments for welfare assistance from a public agency and a part of such payments, adjusted in accordance with the family's actual housing costs, is specifically designated by such agency to meet the family's housing costs, the portion of such payment which is so designated.

42 U.S.C. § 1437a(a) (1983). This relevant portion of the Brooke Amendment sets a limit on rent chargeable to

tenants of low income housing. By definition, this rent includes utilities in an amount not to exceed that set by the Housing Authority, 24 C.F.R. §§ 860.403(a), 865.472 (1983), and approved by HUD. 24 C.F.R. § 865.473 (1983). The Brooke Amendment provisions apply only to lower income families who rent "dwelling units *assisted* under [the United States Housing] Act [of 1937]." 42 U.S.C. § 1437a(a) (1983) (emphasis added). Plaintiffs concede that the Housing Authority operates "its projects with federal subsidy pursuant to an Annual Contribution Contract" [5] from HUD, and that "HUD retains general enforcement authority." Plaintiffs' Brief in Support of Summary Judgment p. 3, 18. Thus, although low income families are certainly one of the beneficiaries of the Brooke Amendment, they are not the only beneficiaries. Consistent with the other provisions of the Housing Act, "the legislation had two beneficiaries—states as direct beneficiaries and low-income families as indirect beneficiaries." *Perry*, 664 F.2d at 1213.

Although finding that an implied right of action existed under the Brooke Amendment against HUD, the United States Court of Appeals for the Sixth Circuit, in *Howard v. Pierce*, 738 F.2d 722 (6th Cir. 1984), "could discern no justification for extending such a cause of action to a public housing agency . . . ." *Id.* at 730. In so holding, the Sixth Circuit, applying the second *Cort* factor, found that "nowhere in the legislative history . . . [was there] an expression of intent either to provide or deny a private means of enforcing the Brooke Amendment." *Id.* at 727. As the Fourth Circuit determined in *Perry*, "Con-

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[5] Annual Contributions Contract ("ACC")

A contract (in the form prescribed by HUD) for loans and annual contributions whereby HUD agrees to provide financial assistance and the PHA agrees to comply with HUD requirements for the development and operation of a public housing project.

24 C.F.R. § 841.103 (1983).

gress need not fear that unless it specifically denies a cause of action, the courts will automatically imply one; when Congress is silent there is no presumption in favor of a legislatively created cause of action." *Perry*, 664 F.2d at 1213. Thus, under the *Cort* analysis, this court holds that there exists no implied right of action under the Brooke Amendment against a public housing authority such as RRHC.[6]

III.

CAUSE OF ACTION UNDER 42 U.S.C. § 1983

42 U.S.C. § 1983 provides for the redress of deprivations of rights secured by the United States Constitution or statutes under color of state law. Though there is no constitutional right to the housing involved here and thus no constitutional violation, *Lindsey v. Normet*, 405 U.S. 56, 74 (1972), the Supreme Court has recognized that a § 1983 action may be based solely upon a violation of a federal statutory right. *Maine v. Thiboutot*, 448 U.S. 1 (1980). In order to prevail under a purely statutory-based § 1983 claim, however, the court must determine "[f]irst, whether Congress, in enacting the statute, manifested in the statute itself an intent to foreclose its private enforcement [and] [s]econd, whether the statute is of a kind aimed at creating enforceable 'rights' under § 1983." *Phelps v. Housing Authority of Woodruff*, 742 F.2d 816, 820 (4th Cir. 1984); *Middlesex City Sewage Authority v. National Sea Clammers Association*, 453 U.S. 1, 17, 20 (1981). Failing either of these, there can be no cause of action under § 1983. *Pennhurst State School and Hospital v. Halderman*, 451 U.S. at (1981).

An analysis of the language of the statute itself shows that there is no explicit denial of private enforcement; however, this court is of the opinion that Congress has

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[6] Other courts have reached a similar conclusion. See *Howard v. Pierce*, 738 F.2d 722 (6th Cir. 1984); *McGhee v. Housing Authority of City of Lanett*, 543 F.Supp. 607 (M.D. Ala. 1982); *Jackson v. Housing Authority of City of Fort Myers*, No. 82-136-CIV-A.N.-17 (M.D. Fla. April 4, 1984).

evinced, in the implementing regulations of the Brooke Amendment, an intent to foreclose private enforcement. The implementing regulations provide two means by which utilities may be provided: PHA-Furnished Utilities and Tenant Purchased Utilities.

> Allowances for PHA-Furnished Utilities represent the maximum consumption units (e.g., kilowatt hours of electricity), which may be used by a dwelling unit without a surcharge for excess consumption against the tenant. Allowances for Tenant-Purchased Utilities represent fixed dollar amounts which are deducted from the Gross Rent otherwise chargeable to a tenant who pays the actual Utility charges directly to the Utility suppliers whether they be more of [sic] less than the amounts of the Allowances.

24 C.F.R. § 865.470 (1983). These regulations provide for relief from excess charges of both PHA-Furnished and Tenant Purchased Utilities where a possible defect in the utility meter or error in the meter reading is involved, and in the case of PHA-Furnished utilities, if there is a defect in the dwelling. 24 C.F.R. § 865.481(a)(1), (a)(2) (1983). However, requests for relief from excess consumption on the grounds "that the utility consumption exceeds the applicable Allowance by 20 percent or more for reasons other than wasteful or unauthorized usage" are permitted "[i]n the case of Tenant-Purchased utilities only." 24 C.F.R. § 865.481(a)(3) (1983). Since the HUD regulations permit such requests for relief to be submitted to the PHA solely in the case of Tenant-Purchased Utilities, it is clear that such requests are foreclosed in a case such as this involving PHA-Furnished Utilities. Because Congress has "manifested an intent" to foreclose private enforcement, the plaintiffs have no enforceable rights within the meaning of section 1983 against a public housing authority such as RRHC.

Secondly, although the Brooke Amendment clearly manifests congressional intent to benefit generally tenants of public housing, its chosen means of accomplishing that

end is for HUD, rather than the tenants themselves, to enforce the statutory requirements. RRHA operates its projects with federal subsidies pursuant to an Annual Contributions Contract ["ACC"] "whereby HUD agrees to provide financial assistance and [RRHA] agrees to comply with HUD requirements for the development and operation of a public housing project." 24 C.F.R. § 841.103.[7] Plaintiffs allege that RRHA has failed to follow federal law prescribing how utility allowances are to be set and maintained. If RRHA has indeed breached any of the conditions of the Annual Contributions Contract, HUD has "the right . . . to maintain any and all actions at law or in equity against the Local Authority to enforce the correction of any such default or to enjoin any such default or breach." HUD Annual Contributions Contract § 508. "In sum, the whole of the legislative scheme . . . indicates Congress's intention that HUD should continue to enforce required conditions by means of asserting its rights under the ACC, thereby intending 'to foreclose private enforcement' of the requirements of the Housing Act." *Phelps v. Housing Authority of Woodruff*, 742 F.2d 816, 821 (4th Cir. 1984).

Even were the implementing regulations of the Brooke Amendment and the provisions of the ACC found not to foreclose private enforcement, the Fourth Circuit Court of Appeals has determined that in order for a violation of a federal statute to create "rights, privileges, or immunities" within the meaning of § 1983, it must at the least be of a kind that gives rise to an implied cause of action. In *Perry*, the court determined that the Housing Act did not create rights enforceable in private actions under § 1983. Although it could be argued that the

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[7] Section 5(1) of the Annual Contributions Contract between HUD and RRHA also provides that "[t]he Local Authority shall . . . operate all Projects covered by this Contract in compliance with all provisions of Contract and all applicable provisions of the [United States Housing] Act [of 1937] . . . ." Section 311 allows HUD to inspect and to audit all the books, documents, papers, and records of the Local Authority that are pertinent to its operations with respect to financial assistance under the Act.

provisions involved here are more specific than those in *Perry* and thus create such enforceable rights, this court must reject such a narrow interpretation of *Perry* in view of the fact that the Court of Appeals did not specifically limit its ruling to the provisions involved.[8] If there were any doubt as to the principle enunciated in *Perry*, it was dispelled by the holding in *Home Health* that "the conclusion that Home Health has no [implied] right of action . . . under 42 U.S.C. § 1395a *compels* the conclusion that Home Health likewise has no cause of action under §§ 1983 and 1985." *Home Health*, 706 F.2d at 498. (emphasis added).

Because this court finds that the plaintiffs have failed to state a cause of action under 42 U.S.C. § 1983,[9] the defendant's Motion for Summary Judgment must be GRANTED. Each side shall bear its own taxable costs. An accompanying order shall be entered this day.

The Clerk of Court is directed to send certified copies of this opinion to counsel of record.

DATED: This 21st day of December 1984.

/s/ James C. Turk
Chief U.S. District Judge

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[8] In *Phelps*, the Fourth Circuit Court of Appeals also declined to limit its holding in *Perry*, when it stated that "[a]lthough it might be argued that *Perry* is distinguishable, since the preference and notice rights [here] are more specific . . . we are not persuaded that this distinction is of sufficient moment to alter our conclusion that the defendants' actions did not deprive the plaintiffs of any 'rights secured by the . . . laws of the United States.'"

[9] Since this court finds that the plaintiffs have failed to state a claim under § 1983, it is unnecessary to determine whether HUD is an indispensable party to the action. This court also dismisses the plaintiffs' cause of action based on the defendant's alleged breach of its lease agreements with the plaintiffs, under the doctrine of pendant jurisdiction as set forth in *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966).

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

Civil Action No. 82-0908

BRENDA E. WRIGHT, *et al.*, PLAINTIFFS

vs.

CITY OF ROANOKE REDEVELOPMENT
AND HOUSING AUTHORITY, DEFENDANT

ORDER

By: James C. Turk, Chief District Judge

In accordance with the Court's Memorandum Opinion filed this day, it is hereby

ORDERED

that the defendant's Motion for Summary Judgment shall be, and hereby is, GRANTED.

The Clerk of Court is directed to send certified copies of this Order to counsel of record.

ENTER: This 21st day of December, 1984.

/s/ James C. Turk
Chief U.S. District Judge

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-1068

BRENDA E. WRIGHT; GERALDINE H. BROUGHMAN; SYLVIA P. CARTER; individually and on behalf of all persons similarly situated, APPELLANTS

versus

CITY OF ROANOKE REDEVELOPMENT and HOUSING AUTHORITY, APPELLEE

Appeal from the United States District Court
for the Western District of Virginia, at Roanoke
James C. Turk, Chief Judge—(CA 82-908)

Argued: June 6, 1985 Decided: August 26, 1985

Before WIDENER and MURNAGHAN, Circuit Judges, and GORDON, Senior United States District Judge for the Middle District of North Carolina, sitting by designation.

OPINION

MURNAGHAN, Circuit Judge:

Tenants of public low-cost housing brought an action against their landlord, the Roanoke Redevelopment and Housing Authority ("RRHA"). Their complaint was based on the alleged deprivation of the tenants' rights under the Brooke Amendment of the United States Housing Act of 1937, 42 U.S.C. § 1437(a),[1] and particular United States Housing and Urban Development ("HUD") regulations pertaining to utility allowances issued pursuant to that statute. Specifically, the tenant class alleged that the RRHA disregarded HUD regulations governing the establishment of "reasonable" electric utility allowances and the periodic revision of unreasonably low allowances. Thus, the tenants claimed that they were wrongfully overcharged for electrical consumption in excess of their designated allotments.[2]

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[1] § 1437a. Rental payments

(a) Families included; amount

Dwelling units assisted under this chapter shall be rented only to families who are lower income families at the time of their initial occupancy of such units. Reviews of family income shall be made at least annually. A family shall pay as rent for a dwelling unit assisted under this chapter (other than a family assisted under section 1437f(o) of this title) the highest of the following amounts, rounded to the nearest dollar:

(1) 30 per centum of the family's monthly adjusted income;

(2) 10 per centum of the family's monthly income; or

(3) if the family is receiving payments for welfare assistance from a public agency and a part of such payments, adjusted in accordance with the family's actual housing costs, is specifically designated by such agency to meet the family's housing costs, the portion of such payments which is so designated.

[2] The appellants brought a second claim grounded on an alleged violation of a provision in the standard lease issued by RRHA. According to the tenants, RRHA's failure to furnish electrical

First, we must consider the correctness of the route which the plaintiffs sought to follow in their quest for injunctive and monetary relief,[3] namely, 42 U.S.C. 1983.[4]

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utilities service reasonably necessary for lighting and general household appliances at no charge violated its obligation to tenants under Paragraph 4 of their standard lease. Paragraph 4 of the standard lease provides:

> Utilities: Management Agent agrees to furnish at no charge to the Resident the following utilities as *reasonably necessary*: hot and cold water, gas for cooking, and *electricity for lighting and general household appliances* and heat at appropriate times of the year, and also range and refrigerator. Resident will be required to pay for all excess consumption of utilities above the monthly allocated amount as developed by the Authority and determined by the individual check meter servicing the leased unit. The schedule of allocations and charges for excess consumption is posted on the bulletin board of each Housing Development office.

(Emphasis added).

[3] The appellants initially sought injunctive relief requiring the RRHA to comply with the Brooke Amendment and federal regulations and a refund for all surcharges collected in violation of said law and regulations.

On appeal, however, the appellants stated that newly issued HUD regulations, 24 C.F.R. § 965.470-480 (1985) mooted their claim for injunctive relief and that only their claim for damages remained viable.

[4] § 1983. Civil action for deprivation of rights

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

It is now widely recognized that 42 U.S.C. § 1983 may be invoked to redress certain violations of federal statutory law by state actors. *Maine v. Thiboutot*, 448 U.S. 1 (1980). Not all violations of federal law, however, give rise to § 1983 actions. In order to determine whether a violation of a particular federal statute constitutes a basis for § 1983 liability, a court must make two inquiries: 1) whether Congress had foreclosed private enforcement of the pertinent statute in the enactment itself, *and* 2) whether the statute at issue was the kind that created enforceable "rights" under § 1983. *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1, 19 (1981); *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 28 (1981).[5]

We have recently ruled that violations of the Housing Act of 1937 do not give rise to a § 1983 cause of action. *See Perry v. Housing Authority of City of Charleston*, 664 F.2d 1210, 1217-1218 (1981); *Phelps v. Housing Authority of Woodruff*, 742 F.2d 816, 820-822 (1984). In Perry, low income tenants brought an action for declaratory and injunctive relief and damages against the local housing authority. The tenants based their action on 42 U.S.C. § 1473[6] and on 42 U.S.C. § 1983. The

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[5] In other words, the right asserted must itself be created in such other federal statute, for 42 U.S.C. § 1983 provides only a remedy and does not itself create rights. *See, e.g., Miener v. State of Missouri*, 673 F.2d 969, 976 n.6 (8th Cir. 1982), *cert. denied*, 459 U.S. 909, 916 (1982) ("Section 1983 is remedial in nature, and does not itself provide for any rights, substantive or otherwise."); *Birnbaum v. Trussell*, 371 F.2d 672, 676 (2d Cir. 1966) ("Sec. 1983 . . . should be interpreted with sufficient liberality to fulfill its purpose of providing a federal remedy in a federal court in protection of a federal right.").

[6] § 1437. Declaration of policy

> It is the policy of the United States to promote the general welfare of the Nation by employing its funds and credit, as

tenants claimed that the landlord failed to keep the premises safe and clean as required by 42 U.S.C. § 1437. We ruled that although the tenants were intended beneficiaries of the Act, the benefit was not without limits. It did not include the right to sue for what Congress had conferred. That is to say, there was no implied private right of action under § 1437. "[T]he legislative history indicates no intention to create in the Housing Act a federal remedy in favor of tenants but does indicate quite clearly the intention to place control of and responsibility for these housing projects in the local Housing Authorities." *Perry*, *supra*, at 1213. We also rejected the tenants' argument that they had a cause of action pursuant to 42 U.S.C. § 1983 since the tenants had failed to indicate "any substantive provisions of the various housing acts which [gave] them a tangible right, privilege, or immunity." *Id.* at 1217. While we acknowledged that "the Act was designed to help low income families" we emphasized that "the actual assistance went not to the tenants, but to the states." *Id.* We therefore concluded that § 1437 did "not create any legally cognizable rights in tenants of programs funded under the housing statutes." *Id.* We noted though that our disposition of the tenants' § 1437 and § 1983 claims did not deprive the tenants of a remedy. "The lease between the plaintiffs and [the local housing authority] creates a landlord-tenant relationship. Plaintiff's rights are based on this lease and their remedy, if any, lies in the [State] courts." *Id.* at 1217-1218, n.15.

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provided in this chapter, to assist the several States and their political subdivisions to remedy the unsafe and unsanitary housing conditions and the acute shortage of decent, safe, and sanitary dwellings for families of lower income and, consistent with the objectives of this chapter, to vest in local public housing agencies the maximum amount of responsibility in the administration of their housing programs. No person should be barred from serving on the board of directors or similar governing body of a local public housing agency because of his tenancy in a lower income housing project.

In *Phelps*, tenants challenged the legality of the local housing authority's policies regarding the admission of new tenants. The tenants claimed that such policies deprived them of their "right" to be selected under the tenant preference provisions outlined in the Act and that therefore they had a cause of action pursuant to § 1983. In evaluating the viability of the § 1983 action in light of *Middlesex* and *Pennhurst*, *supra*, we first considered whether Congress foreclosed private enforcement of the Housing Act in the enactment itself. On that score, we concluded:

> [A]lthough [the statutory sections in question] clearly manifest Congressional intent to benefit generally applicants who are involuntarily displaced or who occupy substandard housing, its chosen means of accomplishing that end is plainly that *HUD, rather than private litigants, is to be the enforcer of the statutory directive.* Apart from the obvious lack of any affirmative statutory language indicating a Congressional intention to allow private remedial suits, the statute is replete with indications of an intention to entrust HUD with the means and the responsibility for effective enforcement. The statutory scheme requires the Secretary to include in all Annual Contributions Contracts a requirement that public housing authorities adopt tenant selection criteria which include express preferences and a requirement that eligible applicants be notified of expected occupancy dates "insofar as . . . can be reasonably determined." Under the statute the Secretary performs extensive audits to verify the authorities' compliance with the conditions of the ACC, and HUD is authorized, as contract promisee, to enforce compliance by the most drastic possible means: termination of the federal subsidies under the contract. In sum, the whole of the legislative scheme, we think, indicates Congress's intention that HUD should continue to enforce required conditions by means of asserting its rights

under the ACC, thereby intending "to foreclose private enforcement" of the requirements of the Housing Act.

Phelps, supra, 742 F.2d at 821 (emphasis added). In sum, the situation is very analogous to the one in which a trustee, not the *cestui que trust*, must bring suit. *See, e.g., In Re Romano*, 426 F. Supp. 1123, 1128 (N.D. Ill. 1977), *modified*, 618 F.2d 109 (1980) ("trustee is the only party who can sue a tenant for back rent even if the beneficiary has the right to the land's proceeds").[7]

As to the second *Middlesex* inquiry, *i.e.*, whether the rights allegedly conferred by the preference and notice provisions were the kind of "rights" enforceable under § 1983, we concluded that no such "rights" were involved. *Phelps, supra*, 742 F.2d at 821-822. We ruled that it was highly unlikely that Congress intended federal courts to "make the necessary balancing of inevitably conflicting interests as between different applicants and possibly opposing statutory purposes that would be required to adjudicate individual claims of right." *Id.* at 822. Likewise, in the instant case, we consider it highly unlikely that

[7] It was not an act of caprice on the part of Congress to designate HUD the "enforcer" of the Housing Act. Rather, consolidating enforcement of the Act in a single governmental body was a practical legislative attempt to protect the limited resources available to the government. In other words, HUD can act as a screening body and focus its attention on those housing developments sorely needing attention without risking the depletion of funds available for redressing violations of the Housing Act.

It should be noted that, in the instant case, the tenants stated at oral argument that they asked HUD to confront RRHA with its alleged violations of the Brooke Amendment. According to the tenants, HUD declined to intervene. HUD's decision presumably reflected an intricate economic "sifting and weighing" process in which it assessed the utility of proceeding further on the tenants' behalf. Since the tenants chose not to join HUD as a defendant, we need not look behind HUD's decision in order to determine whether it breached any duty—perhaps that of a "trustee" owed to low-cost housing tenants under the Act. *Cf. Howard v. Pierce*, 738 F.2d 722, 730 (6th Cir. 1984).

Congress intended federal courts to make the necessary computations regarding utility allowances that would be required to adjudicate individual claims of right.

To conclude, the plaintiffs under 42 U.S.C. § 1437(a) have certain rights but the remedy to enforce them is not conferred on them. Under 42 U.S.C. § 1983, conversely, the statute itself creates no right, but for rights elsewhere created of a certain character the statute provides a remedy. It will not suffice, however, simply to put the § 1437 right and the § 1983 remedy together to enable the case the plaintiffs assert to proceed. The § 1437 right is simply incompatible with the § 1983 remedy, for a characteristic of the § 1437 right is precisely that the plaintiffs are not to have the authority themselves to sue. HUD alone may, as quasi trustee, take legal action, for the right is explicitly tailored not to allow the beneficiaries, the low cost housing tenants, to do so.[8]

[8] The tenants rely on *McGhee v. Housing Authority of City of Lanett*, 543 F. Supp. 607 (M.D. Ala. 1982) to support the proposition that a violation of the Brooke Amendment gives rise to a § 1983 cause of action. Such reliance is misplaced. In *McGhee*, a public housing tenant brought an action against public housing auth ities for setting rent in excess of ¼ of her income in violation of the Brooke Amendment. The tenant asserted a cause of action under both § 1437(a) and § 1983. The district court held that no private right of action existed under the Brooke Amendment but that the tenant had a cause of action under § 1983. The court's analysis pertaining to the existence of a § 1983 claim was, however, by no means exhaustive. The district court, in concluding that a § 1983 action existed, merely cited *Maine v. Thiboutot*, 448 U.S. 1 (1980), for the proposition that "§ 1983 encompasses claims based on purely statutory violations of federal law" without engaging in the more detailed inquiry prescribed in *Middlesex, supra*. Thus, based on the district court's reasoning, any time a plaintiff could assert a violation of federal law, (s)he could establish a § 1983 cause of action regardless of whether Congress foreclosed private enforcement of the particular statute or whether the statute at issue failed to create the type of "rights" enforceable under § 1983. *Maine v. Thiboutot*, however, concerned a *federally* established right to social security benefits which clearly was enforceable by

Thus, in light of *Perry* and *Phelps, supra*, the action of the district judge in granting summary judgment in favor of the RRHA on the § 1983 action and in dismissing the claim based on the lease without prejudice to pursuit by the plaintiffs of any state court cause of action which they may be entitled to assert is affirmed.[9]

AFFIRMED.

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private action in a state court. That, of course, is very different a) from Brooke Amendment benefits which, for reasons already advanced, are not enforceable by private action and b) from rights to bring state court actions under *state* landlord and tenant law.

As for *Beckham v. New York City Housing Authority*, 755 F.2d 1074 (2d Cir. 1985), it must yield to the authority of *Perry* and *Phelps, supra*, from our own circuit.

[9] We have also considered whether the statute relied on, namely, the Brooke Amendment of the United States Housing Act of 1937, 42 U.S.C. § 1437(a), created rights of the type which plaintiffs here assert. *See Cort v. Ash*, 422 U.S. 66 (1975). The tenants in the instant case never asserted a cause of action under the Brooke Amendment but rather limited their claim to § 1983. However, given the close nexus between implying a cause of action under a federal statute and asserting a § 1983 claim, we address the former in order to render our disposition of the case more "complete." *See Phelps v. Housing Authority of Woodruff*, 742 F.2d 816, 822, n.10 (4th Cir. 1984):

> Appellants argue that the district court erred in holding that 42 U.S.C. § 1437d(e)(4)(A) and 42 U.S.C. § 1437d(e)(3)(ii) do not give rise to implied private causes of action. It is somewhat unclear whether they make this argument only in response to the district court's holding that in order for a violation of a federal statute to be actionable under § 1983, that statute must be of such a quality that in essence it gives rise to such an implied action, or whether they suggest that they had asserted such a separate private right of action that was erroneously denied.
>
> As both the complaint and the court's opinion are cast in § 1983 terms, we consider the former interpretation more plausible. *The inquiry under either interpretation of the appellant's position is similar, though not perfectly congruent. Nevertheless, lest our disposition of the case seem incomplete*, we reject plaintiffs' implied private cause of action argument on the reasoning of *Perry v. Housing Authority*, 664 F.2d 1210 (4th Cir. 1981).

(Emphasis added).

Review of the statutory language of the Brooke Amendment reveals no provisions creating a right on the part of individual tenants to assert infractions of the sort claimed here. The existence of such a right is essentially negatived by the provisions of the annual contributions contract, a standardized form employed by HUD in this case. By Section 508 the annual contributions contract provides that HUD has "the right . . . to maintain any and all actions at law or in equity against the local authority to enforce the correction of any . . . default or to enjoin any . . . default or breach." The implication to be drawn from that language runs counter to the claim that the plaintiffs have enforceable rights under the Brooke Amendment.

GORDON, Senior District Judge, Concurring:

I concur in the analysis and the result of the panel's opinion. I write this brief concurrence to emphasize and, I hope, to clarify a point upon which the precedent has become a bit unclear, and which I found troubling. In considering the briefs, oral arguments, and the district court's decision in this case, it became apparent that the proper § 1983 analysis has become mistakenly entangled with the analysis for an implied private right of action. While the two analyses are closely related, they are separate and distinct. My purpose is to disentangle them.

As discussed in the panel's opinion, *Perry v. Housing Authority of Charleston*, 664 F.2d 1210 (4th Cir. 1981), and *Phelps v. Housing Authority of Woodruff*, 742 F.2d 816 (4th Cir. 1984), are the controlling precedent on the issues presented in this case, that is, whether a § 1983 cause of action exists to enforce the Brooke Amendment to the Housing Act of 1937. In each case, this court applied the standards set forth in *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981), and *Middlesex City Sewage Authority v. National Sea Clammers Association*, 453 U.S. 1 (1981), for determining whether § 1983 enforcement of a statutory violation was proper. *See Maine v. Thiboutot*, 448 U.S. 1 (1980). The dual tests for § 1983 enforcement are 1) whether Congress, in enacting the statute and its enforcement scheme, had foreclosed a private remedy, and 2) whether the statute created enforceable "rights, privileges, or immunities" under § 1983. *Middlesex*, 453 U.S. at 19; *Pennhurst*, 451 U.S. at 28, n. 21.

In *Perry* the aggrieved tenants sought relief under § 1983 and also alleged a private right of action under the Housing Act of 1937 (Act). The *Perry* court began its analysis by determining whether the tenants had a private right of action under the Act. To do this, the court applied the test of *Cort v. Ash*, 422 U.S. 66 (1975):

> First, is the plaintiff "one of the class for whose especial benefit the statute was enacted" . . . that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? . . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? . . . and [fourth], is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal laws?

Perry, 664 F.2d at 1211-12 (*quoting Cort v. Ash*, 422 U.S. at 78).

It is clear that many of the elements that a court must consider in applying *Cort v. Ash* would also be relevant in determining whether a 1983 action was proper under *Middlesex* and *Pennhurst*. Both tests hinge on whether "rights" were created in the prospective plaintiffs and whether Congress intended private enforcement by the respective procedure. Distinctions exist, though, however fine. For instance, *Cort v. Ash* instructs us to consider whether there is "any indication of legislative intent . . . either to create [a private] remedy or to deny one," and to ask whether it would be consistent with the underlying purpose to imply one, 422 U.S. at 78; *Middlesex* commands that we ask "whether Congress had foreclosed private enforcement of that statute in the enactment itself." 453 U.S. at 19. Under the former, we must find an intention to imply a remedy before granting one; under the latter, if there is a "right," we assume that private enforcement is permissible absent some clear indication to the contrary. While in many instances this would be a distinction without a difference, it did not prevent the Supreme Court in *Middlesex* from addressing the questions separately.[1]

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[1] The Court was faced with whether a private right of action existed to enforce certain federal pollution control and environ-

The *Perry* court first addressed whether the tenants could pursue a private right of action under the Act, and applied *Cort v. Ash*. Because the sections of the Act relied on by the plaintiffs in *Perry* were merely broad policy provisions, and because HUD was the intended enforcer of the Act, the court concluded that there were no "rights" created and no intent to imply a private remedy. The court therefore refused to imply a private right of action. Turning to whether the tenants could sue under § 1983, the *Perry* court focused on the second prong of the *Middlesex* test: whether the statute created privately enforceable "rights." Based partly on the same factors the court had considered in its *Cort v. Ash* discussion, the *Perry* court concluded that the Act "does not create any legally cognizable rights in tenants of programs funded under the housing statutes." 664 F.2d at 1217. Because it had answered this inquiry in the negative, the court never reached the issue of legislative intent to foreclose § 1983 enforcement.

Subsequently, in *Home Health Services v. Currie*, 706 F.2d 497 (4th Cir. 1983) (per curiam), this court was faced with a claim alleging a private right of action under the Medicare Act. The court applied *Cort v. Ash* and concluded that no such private right of enforcement existed. The court noted that, although a § 1983 claim had not been raised at trial, one had been argued on appeal. Assuming, *arguendo*, that the issue was properly before it, the court stated that "the conclusion that Home Health has no right of action [under this statute]

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mental protection acts. The Court stated that "both the structure of the Acts and their legislative history lead us to conclude that Congress intended that private remedies in addition to those expressly provided should not be implied." 453 U.S. at 18 (applying *Cort v. Ash*). The Court then applied the test for § 1983 and, based on these same factors, concluded that "the existence of . . . express remedies [in the statutes] demonstrate not only that Congress intended to foreclose implied private actions but also that it intended to supplant any remedy that otherwise would be available under § 1983." *Id.* at 21.

compels the conclusion that Home Health likewise has no cause of action under § 1983. . . ." *Id.* at 498 (*citing Perry*, 664 F.2d at 1217-18). Read in context, this language means "as in *Perry*, we find that based upon the same elements which lead us to conclude that no private right of action exists under *Cort v. Ash*, we conclude that there is no § 1983 right under *Middlesex*." Taken out of context, however, it could imply, incorrectly, that application of the *Cort v. Ash* test suffices to answer the § 1983 inquiry as well, *i.e.*, that the conclusion that there is no private right of action leads inexorably to dismissing a § 1983 action.

The potential for misinterpreting this language may have been foreshadowed in *Phelps v. Housing Authority*, 742 F.2d 816 (4th Cir. 1984). In *Phelps*, as in *Perry*, the plaintiffs attempted to sue under the broad policy provisions of the Housing Act, but, unlike the *Perry* plaintiffs, the tenants urged their claim solely under § 1983. Applying *Pennhurst*, *Middlesex*, and *Perry*, the court in *Phelps* concluded that a § 1983 action was not proper. In a footnote, the court noted:

> Appellants argue that the district court erred in holding that 42 U.S.C. § 1437d(c)(4)(A) and 42 U.S.C. § 1437d(c)(3)(ii) do not give rise to implied private causes of action. It is somewhat unclear whether they make this argument only in response to the *district court's holding that in order for a violation of a federal statute to be actionable under § 1983, that statute must be of such a quality that in essence it gives rise to such an implied action*, or whether they suggest that they had asserted such a private right of action that was erroneously denied.
>
> As both the complaint and the court's opinion are cast in § 1983 terms, we consider the former interpretation more plausible. *The inquiry under either interpretation of the appellant's position is similar, if not perfectly congruent.* Nevertheless, lest our

> disposition of the case seem incomplete, we reject plaintiffs' implied private cause of action argument on the reasoning of [*Perry*].

742 F.2d at 822, n. 10 (emphasis added).

The subject case was brought exclusively under § 1983. In its Memorandum Opinion, the district court quoted from *Home Health* the dictum that "the conclusion that Home Health has no right of action . . . under 42 U.S.C. § 1359a compels the conclusion that Home Health likewise has no cause of action under § 1983. . . ." Thus, the district court concluded that "a determination of whether the plaintiffs have been deprived of 'rights, privileges, or immunities' within the meaning of § 1983 should begin with a determination of whether an implied right of action exists under the Brooke Amendment." *Wright v. City of Roanoke Redevelopment and Housing Authority*, No. 82-0908, Slip Op. at 3 (W.D.W.Va. Dec. 21, 1984). The court proceeded to apply *Cort v. Ash*, and found no private right of action. The district court then discussed *Middlesex*, but in the final analysis, the court decided that plaintiffs could not bring their action under § 1983 based on its conclusion that no private right of action existed, plus the "compels" language of *Home Health*. Slip Op. at 11. This seems to represent a misinterpretation of *Home Health* and a confusion of the appropriate analysis for these two distinct remedial devices.

It is clear from *Perry*, *Phelps*, and from this court's opinion today that the correct inquiry to determine whether a § 1983 action is proper is set forth in *Pennhurst* and *Middlesex*. While any confusion is understandable, it was unnecessary and inappropriate to consider *Cort v. Ash* and its progeny in the subject case. Although the § 1983 analysis closely parallels the *Cort v. Ash* inquiry for implied private rights of action, the two are distinct, however subtly. It is only to emphasize this distinction that I felt compelled to add my voice to the opinion of this court, for I concur fully in its opinion.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

(Attachment to Affidavit of Herbert D. McBride, dated November 16, 1984)

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT LOW RENT PUBLIC HOUSING CONSOLIDATED ANNUAL CONTRIBUTIONS CONTRACT

• • • •

Sec. 5. *Covenant to Develop and Operate*

(1) The Local Authority shall develop each Project being or to be developed and shall operate all Projects covered by this Contract in compliance with all provisions of Contract and all applicable provisions of the Act and applicable provisions of state and local law.

• • • •

Sec. 311. *Access to Records and Projects; Audits*

(A) The Government and the Comptroller General of the United States, or his duly authorized representatives, shall have full and free access to the Projects and to all the books, documents, papers, and records of the Local Authority that are pertinent to its operations with respect to financial assistance under the Act, including the right to audit, and to make excerpts and transcripts from such books and records.

• • • •

Sec. 507. *Definition of Substantial Breach*

(8) If there is any default or breach by the Local Authority in the performance or observance of any term, covenant, or condition of this Contract other than the defaults or breaches enumerated in Sec. 506 or in subsections (1) through (7) of this Sec. 507; and if such default or breach has not been remedied within thirty days or such longer period as may be set by the Government) after the Government has notified the Local Authority thereof.

• • • •

Sec. 508. *Other Defaults or Breaches, and Other Remedies*

(B) If the Local Authority shall at any time be in default or breach, or take any action which will result in a default or breach, in the performance or observance of any of the terms, covenants, and conditions of this Contract, then the Government shall have, to the fullest extent permitted by law (and the Local Authority hereby confers upon the Government the right to all remedies both at law and in equity which it is by law authorized to so confer) the right (in addition to any rights or remedies in this Contract specifically provided) to maintain any and all actions at law or in equity against the Local Authority to enforce the correction of any such default or breach or to enjoin any such default or breach.

• • • •

SUPREME COURT OF THE UNITED STATES

No. 85-5915

BRENDA E. WRIGHT, GERALDINE H. BROUGHMAN and SULVAI P. CARTER, PETITIONERS

v.

CITY OF ROANOKE REDEVELOPMENT AND HOUSING AUTHORITY

ON PETITION FOR WRIT OF CERTIOARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

January 21, 1986

No. 85-5915

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

BRENDA E. WRIGHT, GERALDINE H. BROUGHMAN, and SYLVIA P. CARTER individually and on behalf of all persons similarly situated,

Petitioners,

v.

CITY OF ROANOKE REDEVELOPMENT AND HOUSING AUTHORITY,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

---

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

1. Does the Brooke Amendment to the Housing Act of 1937 vest public housing tenants with substantive rights of the sort which can be enforced under § 1983?

2. Does 42 U.S.C. § 1983 authorize private enforcement of a federal entitlement only if a right of action can also be implied from the underlying federal statute?

3. Did Congress, by vesting HUD with general regulatory authority in the United States Housing Act of 1937, intend to foreclose private enforcement of the Act pursuant to § 1983?

4. Must the federal courts entertain, under federal question jurisdiction, a right of action upon a tenant lease which unavoidably raises a substantial federal issue under the Housing Act of 1937 and implementing regulations?

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OPINIONS BELOW

The opinion entered by the Court of Appeals for the Fourth Circuit in No. 85-1068 (August 26, 1985) is published at 771 F.2d 833 (4th Cir. 1985), and included in the joint appendix at JA30. The order and opinion of the District Court are published at 605 F.Supp. 532 (W.D. Va. 1984), and included in the joint appendix at JA19 and JA29.

JURISDICTION

The judgment of the Court of Appeals was entered on August 26, 1985, and a timely petition filed within 90 days thereafter. This Court has jurisdiction to review the judgment by writ of certiorari under 28 U.S.C. § 1254(1). The writ of certiorari was granted on January 21, 1986.

STATUTES AND REGULATIONS INVOLVED

The following statutes and regulations central to the case are set forth in a statutory appendix to this brief:

STATEMENT OF THE CASE

Petitioners are low-income tenants of public housing projects owned and operated by respondent City of Roanoke Redevelopment and Housing Authority ("the Authority"). They complain that the Authority has required its tenants to pay rental surcharges for electric utility service which are in violation of the rent limits imposed by Congress through the Brooke Amendment to the United States Housing Act of 1937, 42 U.S.C. § 1437-37j ("USHA"), and implementing regulations of

the United States Department of Housing and Urban Development ("HUD").

The Authority's projects were built and are operated with subsidies under USHA. A critical portion of USHA is the Brooke Amendment, added in 1969, which limits the rent which can be charged low-income public housing tenants. A companion provision subsidizes local public housing agencies ("PHAs") to cover the resulting deficit in operating costs. When these claims arose the relevant portion of the Brooke Amendment, 42 U.S.C. § 1437a(1) (statutory appendix at SA1), limited the rent which could be charged a family of very low income to 25% of family income.[1]

In the absence of careful definitions, PHAs could easily evade the Brooke Amendment limit by adding on a host of other charges for essential services to achieve the same effect as higher rents. To avoid this problem HUD has historically considered "rent" in the public housing program to include shelter cost plus a reasonable amount for utilities. A charge for any part of a "reasonable utility allowance" violates the rent ceiling established by the Brooke Amendment. A housing authority may impose additional rental surcharges only for "excessive" consumption.

The Housing Authority purchases electricity from the power company through a master meter and distributes the electricity to the tenant units through individual

[1] The present version of the Brooke Amendment, now 42 U.S.C. § 1437a(a), is worded differently (SA2) and fixes rent at 30% of income for families of lower income. Amendment has had no operative effect on this suit, since the Housing Authority has always maintained its rent levels at the highest percentage authorized.

checkmeters (Int. ans. no. 4).[2] Since at least 1969 the Housing Authority has maintained a schedule of electricity allowances for project apartments by size and period of year (Int. ans. no. 11). The allowances were calculated by Housing Authority management in consultation with the power company, and before this suit were last revised in 1977 (Int. ans. no. 11). There is no remaining record of what consumption requirements, if any, were considered in designing or revising the allowances (Int. ans. no. 12). If the allowances ever had a rational basis, evidence of that could not be produced by the Housing Authority.

The standard against which these allowances are to be measured is set by HUD's regulations entitled "Tenant Allowances for Utilities," 24 C.F.R. §§ 865.470-.482 (1983), promulgated at 45 Fed. Reg. 59502, 59505 (1980) (statutory appendix at SA4-13). HUD's utility regulations had several main thrusts:

(1) they were mandatory, as opposed to the previous non-mandatory guidelines (§ 865.473);

(2) they required each PHA to recalculate its utilities allowances on the basis of current data (§ 865.476);

(3) they required the allowances thus established to meet the needs of 90% of the dwelling units of each type and size (§ 865.476);

(4) they required the PHA to give notice of the proposed allowances with an opportunity for tenant comment

[2] These and subsequent facts were made part of the record in support of the tenants' motion for summary judgment on the Authority's liability. The factual showing was drawn from the Authority's responses to discovery and has not been disputed, so that there is no "genuine dispute of material fact," Fed.R. Civ. P. 56.

(§ 865.473, prior to amendment at 47 Fed. Reg. 19123 (1982));

(5) they required that the PHA advise tenants of what major equipment consumption had been included in the allowances, in order to avoid misunderstanding (§ 865.473); and

(6) they required that the PHA review tenant billings for excess consumption after every quarter, and consider revision of the allowances if surcharges exceeded 25% of any category of units (§ 865.480(b)(i)).

HUD's utility allowance regulations became effective October 1, 1980, with full compliance required by January 28, 1981, 24 C.F.R. § 865.482. The Housing Authority was duly notified of the regulation by HUD and encouraged to comply even before the deadline if possible (Int. ans. no. 19).

The Authority did absolutely nothing to comply. The Housing Authority "deemed its procedures in effect . . . as being in substantial compliance" (Int. ans. no. 19(c)). The Authority did not use its existing consumption data to calculate whether existing allowances would meet 24 C.F.R. § 865.477's standard, sufficiency to meet the requirements of 90% of the dwelling units in each category. (*Id.*) It did not attempt to include consumption requirements of major equipment furnished by the Authority. It did not include with its rent schedules a list of the specific items of major equipment whose utility consumption requirements were included in determining the allowances, and did not make such a list available to tenants (Int. ans. no. 16). Since it went through no review process, the Authority naturally did not go through the process for tenant notice and comment which was then mandated for such revisions. The January 28, 1981, deadline for use of the new standards came and went, with no action by the Authority. The Authority continued to surcharge tenants 3 cents per KWH for consumption in excess of the allowances, but never reviewed the percentage of tenants surcharged to see if it exceeded 25%, and never used those findings to establish a revised allowance (answer ¶ 10, JA13).

The consumption data supplied by the Authority shows that instead of 10% or less, the vast majority of tenant families paid a utilities rental surcharge for most quarters after the effective date of the utility regulation (Int. ans. no. 7). The percentage of surcharges in Lansdowne Park project, for instance, ranged from a low of 65% for 1-bedroom units in the second quarter of 1982 to a high of 100% for 4-bedroom units in the 1st quarter in 1981. Throughout the projects, larger units were always in the higher ranges, often 99-100%. Over the two-year period 1981-1982 the total dollar amount of the surcharges was $113,114.54 (Int. ans. no. 8).

The high percentage of surcharges is not surprising considering the overall increase in electrical consumption between the 1977 revision and 1981, when the Housing Authority "deemed" those allowances to be adequate compliance with the new regulations. During this period consumption for the 7 projects in question rose from 4,632,928 to 5,104,762 kilowatt hours—a 9.82% increase (Int. ans. no. 9)—despite the heavy disincentive of the rental surcharge. The increase from 1969, when the allowances were first established, would undoubtedly be more dramatic, but the Authority was not able to provide consumption figures going back that far.

Effective April 1, 1982, the Authority again revised its inadequate electrical utilities allowances, but only to make the situation worse. It increased the rental surcharge by 50%, from 3 cents to 4.5 cents per KWH; and it averaged quarterly variations in the 1977 allowances, rounding the resulting figure upward to the nearest 10

KWH (Int. ans. no. 10), an obvious administrative convenience but hardly an attempt at realism.[3] This revision did not purport to be based on the consumption data and standards called for by the federal regulation (Int. ans. no. 10). No prior notice or opportunity to comment was given to tenants prior to the adoption of the revised allowances, although these were still required by 24 C.F.R. § 865.473. The per KWH surcharge established for excess consumption (4.5 cents), based on predicted future cost of the overall average KWH for the projects in question (Int. ans. no. 6), well exceeded the actual cost of the excess consumption to the Authority at the time (Int. ans. no. 6).

Petitioners are tenants who lived with their families in the Authority's projects. All were families of "very low income" within USHA's statutory scheme. Brenda Wright had lived in her project for 11 years, and utilities surcharges placed a serious drain upon her modest earnings as a hospital dietary aide (complaint ¶ 25-26, JA8). Geraldine Broughman's public assistance and work training stipend were so stretched by quarterly utility surcharges that she often needed several months to pay them off. She had lived in her project over 4 years and could not remember any quarter when she and her neighbors escaped a utility surcharge to their rent (complaint ¶ 27-29, JA9). Sylvia Carter's surcharge for the quarter

[3] In fact, the 1982 modifications were an allowance *decrease* in practice. If it was realistic to give a higher allowance in winter than in summer—the Housing Authority's practice 1969-82—then averaging the 2 seasons would produce an unneeded surplus in the summer and a predictable excess consumption in the winter. The tenant gets no benefits from the unused summer allowance, while the Authority gets to charge for excess usage in winter. The supposedly neutral average is therefore a net loss to the tenant and a revenue producer for the Authority. The practice is contrary to the intent of the HUD Regulations at 24 C.F.R. § 865.475(a).

preceding suit ($44.28) was almost as much as her monthly rent ($48), and such rental surcharges always strained her public assistance resources (complaint ¶ 30-31, JA9).

These tenants filed this class action suit against the Authority on December 9, 1982, in the District Court for the Western District of Virginia at Roanoke. Their complaint stated two claims: (1) a claim under 42 U.S.C. § 1983 that the Authority was violating their rights under the Brooke Amendment and implementing regulations; and (2) a claim under the Authority's standard lease, in which the Authority agrees to furnish "utilities as reasonably necessary" at no cost additional to the rent. The tenants sought injunctive relief and refund of illegal rental surcharges for themselves and a class.

Jurisdiction of the District Court was invoked under 28 U.S.C. § 1331 (in that the claims raised federal questions under the Brooke Amendment and HUD regulations); 28 U.S.C. § 1337 (insofar as the Brooke Amendment is an exercise of the power of Congress to regulate interstate commerce); and 28 U.S.C. § 1343 (3) and (4) (in that the § 1983 claim asserted a denial of civil rights). Pendent jurisdiction was pled over any state law issues.

Even the filing of the suit did not induce the Authority to comply with the HUD regulations. A class was certified under R. 23(a), (b)(2) and (b)(3). A period of discovery and negotiation followed, and the Authority agreed to escrow future utility surcharges. The Authority moved for judgment on the pleadings asserting that (1) tenants have no implied right of action to enforce the Brooke Amendment; (2) the Brooke Amendment creates no substantive rights enforceable through § 1983; and (3) the tenants' failure to join HUD, an indispensable party, mandates dismissal. The tenants moved for summary judgment on their § 1983 claim under the Brooke Amendment and regulations, and

opposed the dismissal. While the motions were pending, HUD adopted new utilities regulations (24 C.F.R. § 965.470-.480) (1985), promulgated at 49 Fed. Reg. 31399 (1984) and the Authority finally revised its allowances effective January 2, 1985.[4] The parties agree that the request for injunctive relief was mooted by this action; but the tenants' claim for recovery of past improper charges through January 1, 1985 remained.

The district court treated the Authority's motion for judgment on the pleadings as one for summary judgment and granted summary judgment of dismissal. The district court's opinion (JA19, 605 F.Supp. 532) accepted the invitation to find no implied right of action (JA21-25) although the tenants had never urged that basis for their suit. The district court then reasoned that if no right of action could be implied, no right enforceable under § 1983 could exist (JA27-28). Even if it did, then it was foreclosed from § 1983 enforcement by Congress' grant of regulatory authority to HUD (JA25-27). Finally, the district court dismissed the lease claim as a discretionary exercise of pendent jurisdiction over state law claims (JA28, n.9), despite the position of the tenants that the lease claim constituted an independent basis of federal question jurisdiction raising a substantial federal question.

On appeal the Court of Appeals for the Fourth Circuit affirmed. The opinion (JA30, 771 F.2d 833) read that court's previous decisions to say that Congress intended to foreclose private § 1983 enforcement of *any* section of the United States Housing Act of 1937 (JA37). Despite the attempt of a concurring judge to separate the framework of analysis (JA40), the court persisted in an implied right of action analysis, characterizing that inquiry as "similar,

[4] The procedural and substantive propriety of the 1985 allowances is not in issue.

if not perfectly congruent" to examination of § 1983's exceptions (JA38, n.9). Finally, the court upheld the dismissal of the lease claim as an exercise of discretion (JA38).

SUMMARY OF ARGUMENT

Since 1969 the Brooke Amendment to the United States Housing Act of 1937 (now codified as 42 U.S.C. § 1437a(a)) has limited the rent which low-income tenants can be required to pay in public housing projects—originally to 25% of income, now 30%. This rental limit is the essential feature of the entire federal public housing program. On the one hand it assures that the neediest families will have access to public housing without paying a market rent beyond their means; on the other hand it generates an income base against which federal operating subsidies are calculated and paid to the local authorities. While these are its effects, its mechanism is to vest a right to the limited rental in the tenants themselves.

This suit to enforce the Brooke Amendment and its implementing regulations relies in part on § 1983 for a tenant right to sue, following *Maine* v. *Thiboutot*. The case meets the requirements of *Pennhurst State School and Hosp.* v. *Halderman* (Did the plaintiffs have substantive rights secured by federal statute?) and of *Middlesex County Sewerage Auth.* v. *Nat'l Sea Clammers Ass'n* (Did Congress intend to supplant § 1983 by creating comprehensive remedial devices in the statutory scheme?).

Through sixteen years of amendment, recodification, and shifting fashions in housing policy, the Brooke Amendment has remained remarkably constant in its clear, mandatory and specific grant of a substantive right to low income tenants. To implement the Brooke Amendment, HUD has followed the lead of Congress by defining rent to include a reasonable allowance of utilities. In 24

C.F.R. § 865.470-.482 (first promulgated in 1980) HUD told the housing authorities in terms as clear, mandatory, and specific as the statute itself how to calculate utilities allowances within the Brooke limits on rents. The wording of both the Brooke Amendment and HUD's allowance regulations vests substantive rights in the tenants themselves, meeting the test of *Pennhurst*.

From the opinions in *Sea Clammers*, *Pennhurst*, and *Smith* v. *Robinson*, it appears that at least a majority of the Court believe that a § 1983 plaintiff enjoys the presumption that Congress intended its express § 1983 remedy to be available for enforcement of an identifiable substantive right in a federal statute; the burden is on the defendant to show a specific congressional intent to the contrary from explicit evidence in the statute or legislative history if a *Sea Clammers* exception is to apply. While purporting to find a *Sea Clammers* exception, the Fourth Circuit effectively merged that test with a *Cort* v. *Ash* implied rights inquiry, where the burden is clearly upon the plaintiff to establish affirmative evidence of congressional intent. Neither the Brooke Amendment nor USHA generally contains any express statutory evidence of intent to supplant § 1983, nor any alternative remedy. The Fourth Circuit saw this as reason to find no private right of action (a possible implied rights conclusion) when it should have seen the same evidence as support for a private right of action under § 1983.

A proper *Sea Clammers* inquiry should have ended there; instead, the Fourth Circuit relied on the general regulatory authority of HUD as evidence of congressional intent to supplant § 1983 suits. That holding and grounds are unjustified by *Sea Clammers*, are based on an inaccurate reading of HUD's actual authority, and disregard the particular stake which tenants have in the Brooke Amendment rent limits. Preclusion is particularly unlikely because tenants are given no way to trigger HUD enforcement, and exhaustion of purely administrative

remedies is not normally a prequisite of § 1983 in the first place. HUD's own trend has been away from enforcement of Brooke rent limits and utility allowances, and HUD has in similar cases disclaimed even the authority to enforce Brooke.

This is not a joint federal-state funding scheme, but one where the money comes only from the tenants themselves (in rent) and from HUD. Restitution of illegal rental surcharges is simply a return to tenants of their own money and is entirely compatible with the public housing funding scheme, particularly where the Authority's dereliction has been intentional, prolonged, and obstinate.

Finally, and separate from the § 1983 claim, the tenants asserted a federal question jurisdiction claim under their lease and the Fourth Circuit should have honored it. Action on the lease is recognized in state law, but interpretation of a lease provision for furnishing "utilities as reasonably necessary" is uniquely dependent upon the Brooke Amendment and HUD regulations, since it has no point of reference in state law. This "substantial question of federal law" was properly pled, is unavoidably presented, and falls into the mandatory § 1331 jurisdiction of the federal courts, *Franchise Tax Bd.* v. *Construction Lab'rs Vacation Trust*, rather than being a matter of discretionary pendent state jurisdiction. This does not make every public housing lease claim a federal question; it simply follows this Court's federal question precedents instead of confounding them.

ARGUMENT

This case represents a simple application of the § 1983 Civil Rights Act remedy[5] to a statutory entitlement,

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[5] 42 U.S.C. § 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or

following *Maine* v. *Thiboutot*.[6] The low-income tenants who brought the suit are citizens with specific and mandatory rights to limited rental payments under federal law (Point II of this brief). The Authority is a "person," *Monell* v. *Department of Social Serv.*, 436 U.S. 658 (1978), and concedes that it acts under color of state law (answer ¶ 3, JA12). The rental surcharges extracted from the tenants for excess utility consumption were without question a deprivation. Congress did not intend to preclude a private § 1983 remedy (Point III of the brief).

How was such a straightforward application of § 1983 thwarted in this case? The answer, unfortunately, is that the court of appeals badly muddled the tests of *Pennhurst State School and Hosp.* v. *Halderman*[7] (does the plaintiff have substantive rights in the federal law?) and *Middlesex County Sewerage Auth.* v. *Nat'l Sea Clammers Ass'n*[8] (does the statutory enforcement scheme show that Congress intended to preclude a § 1983 remedy?). In the process the court has also confused the implied rights analysis of *Cort* v. *Ash*[9] with the analysis of § 1983 preclusion to erode *Thiboutot*. The effect is to divest public housing tenants of any meaningful federal rights.

Quite independently of § 1983, the tenants in this case also assert a right to sue on their lease, within the jurisdiction of the federal courts. The dismissal of that claim was also erroneous, and creates serious problems for the federal question jurisdiction of the courts. That point is reviewed in the last section of this brief.

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causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

[6] *Thiboutot*, 448 U.S. 1 (1980), held that the protection of § 1983 extends to rights, privileges and immunities secured by all federal statutes, not just to the Constitution and civil rights laws. In dissent, Justice Powell noted that USHA was one of the statutes which arguably could be enforced under the majority's view of § 1983. 448 U.S. at 36.

[7] In *Pennhurst*, 451 U.S. 1 (1981), this Court reviewed the claim of a mentally retarded resident to enforce the patient "Bill of Rights" and other provisions of the Developmentally Disabled Assistance Act. The Court concluded, 451 U.S. at 21, that the Bill of Rights for patients was not actually intended by Congress to give patients any substantive rights or impose affirmative duties on the States. The provision was simply a "findings" section which expressed federal policy in a "hortatory, not mandatory" sense, and was not backed up by the funding necessary for implementation. 451 U.S. at 24. That claim was denied, and the balance of DDA claims remanded for determination of whether patients had "rights secured" by other sections. 451 U.S. at 31.

[8] *Sea Clammers*, 453 U.S. 1 (1981), held that a right of action could not be implied for shell fishermen to enforce the Federal Water Pollution Control Act and Marine Protection, Research and Sanctuaries Act. The Court also considered whether § 1983 was an express congressional authorization of private suits to enforce those environmental acts. Noting the plethora of specific statutory remedies including citizen-suit provisions, the Court concluded that the express remedies not only showed congressional intent to foreclose implied private actions but also to supplant any remedy under § 1983. 453 U.S. at 21.

[9] In *Cort* v. *Ash*, 422 U.S. 66 (1975) the Court identified four factors to be examined to determine whether Congress intended that the courts imply a right of action from a federal statute: (1) is the plaintiff one of the class for whose especial benefit the statute was enacted? (2) is there explicit or implicit evidence of legislative intent to create or deny a private remedy? (3) is an implied remedy for the plaintiff consistent with the underlying purposes of the legislative scheme? (4) is the cause of action one traditionally relegated to state law? 422 U.S. at 78. The Supreme Court has subsequently emphasized the second factor, *see, e.g. Touch Ross & Co.* v. *Redington*, 442 U.S. 560, 578 (1979).

I. THE BROOKE AMENDMENT TO THE HOUSING ACT OF 1937 VESTS PUBLIC HOUSING TENANTS WITH A SUBSTANTIVE RIGHT TO LIMITED RENTS.

Following *Pennhurst*, the court of appeals properly undertook to examine whether the plaintiff tenants in this case had "rights secured" by the Brooke Amendment for § 1983 enforcement (JA33). It then failed to do so. The court reviewed its previous decision in *Perry* v. *Housing Authority*, 664 F.2d 1210, 1217-18 (4th Cir. 1981), noting that the purpose clause of USHA (42 U.S.C. § 1437), like the findings clause in *Pennhurst*, was merely precatory; it did not intend to vest legal rights to particular housing maintenance standards in public housing tenants (JA34). Similarly it reviewed *Phelps* v. *Housing Authority*, 742 F.2d 816, 820-22 (4th Cir. 1984), where it held that the tenant preference provisions of USHA did not intend to vest particular public housing applicants with a right to be selected for admission in relation to other such groups (JA36). When it reached the present case, however, the Fourth Circuit made no examination of the Brooke Amendment.[10] It reluctantly concluded without explanation that "the plaintiffs under 42 U.S.C. § 1437a have certain rights . . ." (JA37).[11]

While this conclusion is correct,[12] the Fourth Circuit

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[10] While it is appropriate under *Pennhurst* to look at the object and policy of the whole law, 451 U.S. at 18, the particular statutory provisions at issue must be closely examined, *id.* at 19-22.

[11] The curious tautology that follows this concession (JA37) seems to reflect a *Sea Clammers* preclusion problem rather than a *Pennhurst* rights problem; see Point III *infra*.

[12] Courts that have examined the statutory evidence have agreed. *See Beckham* v. *New York City Housing Authority*, 755 F.2d 1074, 1077 (2nd Cir. 1985) ("The rent limits set forth in the Brooke Amendment . . . stand in sharp contrast to the finding statute interpreted in *Pennhurst*"). *Beckham* resembles the great majority of federal cases in which public housing tenants were found to have an enforceable

missed the point that proper analysis would have demonstrated: the Brooke Amendment rent limits are not just a statutory afterthought but the very heart of the public housing program.

A. The Brooke Amendment Is The "Essential Feature" and "Backbone" Of The Public Housing Program.

Nationwide there are an estimated 1,270,761 units of public housing owned by 3,068 public housing agencies, with over 3 million tenants in residence.[13] This massive

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right in the Brooke Amendment, either with regard to rents themselves: *Bloom* v. *Niagara Falls Housing Authority*, 430 F.Supp. 1180 (W.D.N.Y. 1977); *Owens* v. *Housing Authority*, 394 F.Supp. 1267 (D.Conn. 1975); *Barber* v. *White*, 351 F.Supp. 1091 (D.Conn. 1972); or with regard to utility surcharge evasions of Brooke in implementing regulations: *Howard* v. *Pierce*, 738 F.2d 722 (6th Cir. 1984); *McGhee* v. *Housing Authority*, 543 F.Supp. 607 (M.D.Ala. 1982); *Nelson* v. *Greater Gadsden Housing Authority*, 606 F.Supp. 948 (N.D.Ala. 1985), *appeal pending*, No. 85-7320 (11th Cir.); *Norman* v. *Housing Authority*, C.A. No. 83V-6-N (M.D.Ala. May 18, 1984)*; *Hudson* v. *Concord Department of Housing*, Civil No. C-83-284S (M.D.N.C. March 14, 1984).* The only decisions, unreported, that question whether the Brooke Amendment gives tenants a substantive right are *Jackson* v. *Housing Authority*, No. 82-136 [CIV-Ft.M-17] (M.D.Fla. April 5, 1984),* *appeal dismissed for lack of final judgment*, 765 F.2d 152 (11th Cir. 1985); *Brown* v. *Housing Authority*, Civil No. CV 384-50 (S.D.Ga. December 12, 1984),* *appeal pending* No. 85-8186 (11th Cir.); and *Hill* v. *Ogburn*, No. TCA 84-7010-WS (N.D.Fla. July 24, 1984)* *appeal pending* No. ____ (11th Cir.). These three cases deserve no weight because of the utter lack of analysis they give the issue. *Stone* v. *District of Columbia*, 572 F.Supp. 976 (D.D.C. 1983), in which the court declined to imply a tenant right of action against PHA utility allowances, was settled on appeal when the housing authority admitted error, No. 83-1999, Order of June 15, 1984 (D.C. Cir.)* [Cases marked * have been lodged with the clerk for the convenience of the Court.]

[13] HUD FY 1986 Congressional Budget Justification, Exhibit to hearings before the Subcommittee of the Committee on Appropriations, House of Representatives, 99th Congress, 1st Session, on "Dept. of HUD—Independent Agencies Appropriation for 1986," Part V, p. T-5, (March 1985).

federal public housing program was created in 1937 "to assist the several States and their political subdivisions to remedy the unsafe and unsanitary housing conditions and the acute shortage of decent, safe and sanitary dwellings for families of low income in rural or urban communities." USHA, 50 Stat. 888, Ch. 896, § 2 (Sept. 1, 1937). The initial scheme called only for federal support for planning and construction. Local public housing authorities (PHAs) would raise money to build housing projects by issuing bonds, and the federal government would make annual payments to the PHAs in amounts adequate to meet the scheduled repayments of principal and interest (present 42 U.S.C. § 1437c(a)).

Local PHAs were given substantial leeway in operating and administering the projects: a 1959 amendment to USHA specified that

> it is the policy of the United States to vest in the local public housing agencies the maximum amount of responsibility in the administration of the low-rent housing program, including responsibility for the establishment of rents and eligibility requirements. . . .

Pub. L. 86-372, § 501, 73 Stat. 679 (1959) (now reflected as amended in 42 U.S.C. § 1437). Rents as set by the local PHAs were used to meet operating expenses. Only those families could be admitted whose income did not exceed five times the rent. This formula, reflecting the original § 1402(1), did not limit rent, but only limited family income for eligibility.[14]

This local discretion approach to public housing was dramatically altered in 1969 by the Brooke Amendment.

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[14] A family could be admitted, for instance, if their income was only twice the rent set by the PHA. It is less clear that a family of such low income could afford to pay half their income for rent.

Concerned that local PHAs were setting rents too high for low income families to be served, Congress adopted Senator Brooke's bill to limit public housing tenant rents which could be charged by PHAs to one-fourth of the family's income. Pub. L. No. 91-152, Title II Sec. 213(a), 83 Stat. 389 (1969) (now reflected as amended in 42 U.S.C. § 1437a(a)). To meet the resulting deficit in local PHA operating expenses, Congress adopted at the same time a system of operating subsidies to local PHAs. Under an annual contributions contract ("ACC") with HUD, the local PHA was to be reimbursed for the difference between the costs of operation and the amount collected from the tenants for rent. Pub. L. 91-152, Title II, § 212, 83 Stat. 389 (1969) (now reflected in 42 U.S.C. § 1437g). Thus the Brooke Amendment became the "essential feature" and "the backbone" of the entire public housing program, *Howard v. Pierce*, 738 F.2d 722, 728, 730 (6th Cir. 1984).

The resulting federal subsidy scheme is significantly different from federal assistance programs such as Aid to Families with Dependent Children and Medicaid. The basic public housing program does *not* involve the states themselves, except insofar as they may legislate authority for the establishment of local PHAs. *No* state or local public funds are involved. The funding comes entirely from tenant rents and federal payments.

While some local discretion is still exercised by PHAs, that discretion must now be "consistent with the objectives of this Act," 42 U.S.C. § 1437, and no longer extends to the establishment of rents or income limits (*compare* 42 U.S.C. § 1437a(a) and (b)(2) *with* 42 U.S.C. § 1437a(1) prior to the 1981 revision of USHA). Besides the statutory prescriptions for rent and income, PHA discretion is also constrained by required standards for leases, 42 U.S.C. § 1437d(1), and mandated maintenance of an administrative grievance procedure, 42 U.S.C.

§ 1437d(k). In addition, local PHAs are subject to the terms of their annual contributions contract with HUD, 42 U.S.C. § 1437d, and to regulations promulgated by HUD under USHA, 42 U.S.C. § 1408.

B. The History Of The Brooke Amendment Manifests Congressional Intent To Vest Public Housing Tenants With A Substantive Right To Limited Rents.

The Brooke Amendment now appears within 42 U.S.C. § 1437a(a) of the United States Housing Act as follows:

> (a) Dwelling units assisted under this Act shall be rented only to families who are lower income families at the time of their initial occupancy of such units. A family shall pay as rent for a dwelling unit assisted under this Act . . . the highest of the following amounts, rounded to the nearest dollar:
>
> (1) 30 per centum of the family's monthly adjusted income;
>
> (2) 10 per centum of the family's monthly income; or
>
> (3) if the family is receiving payments for welfare assistance from a public agency and a part of such payments, adjusted in accordance with the family's actual housing costs, is specifically designated by such agency to meet the family's housing costs, the portion of such payments which is so designated.

While this present language also defines the extent of tenant duty to pay rent, the legislative history shows beyond doubt a primary focus upon the duty of the PHA to charge tenants no more than the permitted rent ceiling—giving tenants a corresponding right of great importance.

The original Brooke Amendment was added to USHA in 1969. As their operating costs rose, PHAs used their

statutory discretion to set higher and higher rents. The result was that income eligibility for tenants rose with the increase in PHA rent levels. Congress became concerned that "the neediest families had been excluded from the public housing program," S. REP. No. 91-392, 91st Cong. 1st Sess., 2, reprinted in [1969] U.S. CODE CONG. & AD. NEWS 1524, 1542, and "responded with the legal mandate that local housing authorities not attack their financial problems by shutting out the very poor," *Fletcher* v. *Housing Authority*, 491 F.2d 793, 803 (6th Cir. 1974).

Senators Brooke and McIntyre introduced S. 2761, which was later incorporated into the Committee Bill, S. 2864, and became § 213(a) of the Act, December 24, 1969, Pub.L. No. 91-152, Title II, 83 Stat. 389. The Brooke Amendment was a simple parenthetical addition to the definition of "low rent housing" in § 2(1) of USHA, 42 U.S.C. § 1402(1), of the phrase "(which may not exceed one-fourth of the family's income, as defined by the Secretary)." It was accompanied by a provision for operating subsidies to PHAs so that lower rents would be feasible. Pub.L. No. 91-152, Title II, § 212, 83 Stat. 389.

Congressional intent to vest rights specifically in the low-income tenants of public housing is unequivocally shown by frequent references in the enactment process. In the Senate report accompanying S. 2864, the Committee stated that "this section would enable families, regardless of how low their incomes are, to afford the rentals necessary to support project operating costs with no more than 25% of their income." S.REP. No. 91-392, 91st Cong., 1st Sess. 2 reprinted in [1969] U.S. CODE CONG. & AD. NEWS at 1542. When the Committee bill incorporating his amendment went to the Senate floor, Senator Brooke confirmed its purpose with this statement:

> This bill is embodied in § 211 of the present Act [S.2864, later § 213(a) of the Conference Report] and

> would provide additional rental assistance in behalf of very low-income tenants of public housing projects. Thus, rental assistance payments would be available with respect to public housing and leased housing units to enable families of very low-income to afford rentals with no more than 25% of their incomes. . . . We believe that no public housing tenant should pay more than 25% of their income for housing. . . . I anticipate that these funds will be adequate to ensure that no public housing tenants pay more than 25% of their income for housing.

115 CONG. REC. 26721 (1969). Conference with the House of Representatives retained the concept. *See* CONF. REP. No. 91-740, 91st Cong. 1st Sess. 2 reprinted in [1969] U.S. CODE CONG. & AD NEWS 1079, 1582 ("The Conference substitute retains the basic concept of § 211 of the Senate Bill by generally limiting rents that may be charged public housing tenants to no more than 25% of their income").

As thus modified by the Brooke Amendment, USHA then read this way (at 42 U.S.C. § 1402(1), Brooke language emphasized):

> When used in this Act—
>
> (1) **Low-rent housing.** The term "low-rent housing" means decent, safe, and sanitary dwellings within the financial reach of families of low income, and developed and administered to promote serviceability, efficiency, economy, and stability, and embraces all necessary appurtenances thereto. The dwellings in low-rent housing shall be available solely for families of low income. Except as otherwise provided in this section, income limits for occupancy and rents *(which may not exceed one-fourth of the family's income, as defined by the Secretary)* shall be fixed by the public housing agency and approved by the Secretary.

Within the framework of this section, which reserves substantial PHA discretion over income limits and rents and HUD definitional discretion, the Brooke language

stands out as a concrete and specific mandate, not subject to anyone's discretion. There is nothing aspirational or hortatory about the standard, *compare Pennhurst*, 451 U.S. at 15-24; *Perry*, 664 F.2d at 1217. Congress' absolute intention that the rent limits constitute an operative mandate is shown by the accompanying § 213(b) of Brooke in the 1969 Act which sets an effective date specifically for the rent limits.

There is no ambiguity about who is to benefit from Brooke: "low-income tenants are the unmistakable focus of the Brooke Amendment," *Howard* v. *Pierce*, 738 F.2d at 727. The PHAs, the communities in which they are located, and the public at large do not benefit from the rent limitations, as they may from USHA generally, *Perry*, 664 F.2d at 1213, or from other provisions, *Phelps*, 742 F.2d at 822. Also in contrast to *Pennhurst*, Congress has backed up its Brooke Amendment mandate with substantial funding to cover the operating deficit which PHAs would otherwise suffer.

Through sixteen years and five amendments, the Brooke Amendment has retained its mandatory and specific character. In 1970, § 208(a) of Pub.L. No. 91-609, Title II, 84 Stat. 1770, 1778, set forth a statutory definition of income "for the purpose of establishing maximum rentals in public housing projects at one-fourth of tenant income," thereby reducing HUD's discretion over that definition. *See* CONF. REP. NO. 91-1784 91st Cong., 2nd Sess. reprinted in [1970] U.S. CODE CONG. & AD NEWS 5672, 5676. In 1971, Congress enacted a provision (Pub.L. No. 92-213, § 9, 85 Stat. 775) to ensure that public housing tenants receiving welfare assistance received the benefit of reduced rents under Brooke. *See* CONF. REP. NO. 92-727, 92nd Cong., 1st Sess. reprinted in [1971] U.S. CODE CONG. & AD NEWS 2324, 2326.

In 1974, Congress established a minimum rent provision and reworded and recodified the statutory rent lim-

itation. Pub.L. No. 93-383, Title II, § 201(a), 88 Stat. 654, then codified at 42 U.S.C. § 1437a(1). The 1974 Act for the first time stated the rent limitation in a separate sentence: "The rental for any dwelling unit shall not exceed one-fourth of the family's income as defined by the Secretary." The language of the Act originated in the Senate bill, S.3066, and the Senate Report accompanying the legislation described it as follows: "The rent fixed by a PHA could not exceed one-fourth of a low-income family's income, as under existing law. . . ." S.REP. NO. 93-693 93rd Cong., 2nd Sess. at 608, [1974] U.S. CODE CONG. & AD NEWS 4237, 4310. The 1974 legislation also established a welfare rent provision for states that adjusted the shelter component of the welfare grant in accordance with the tenant's actual housing costs.

In 1979, Congress again changed the language of the statutory rent limitation. Pub.L. No. 96-153, Title II, § 202, 93 Stat. 1106. Section 202 amended § 3(1) of the United States Housing Act of 1937 by striking out the language enacted in 1974 and inserting the following: "The rental for a dwelling unit shall not exceed . . . 25 per centum of family income in the case of a very low-income family or, in the case of other families, 30 per centum of such income." This provision of the Act came from the House bill, H.R. 3875. The House Report accompanying the Committee bill noted that "[t]he bill increases the maximum tenant contribution to rent for families with incomes above 50 percent of median from 25 percent of adjusted income to 30 percent." H.R. REP. NO. 96-154 96th Cong., 1st Sess. at 16, *reprinted at* [1979] U.S. CODE CONG. & AD NEWS 2317, 2331. While HUD never implemented this statutory change (*see* 47 Fed. Reg. 75955 (1982)), the language of the statutory provision and the Committee Report again clearly indicate that the statute provides tenants with a substantive right to limited rents.

Finally, in 1981, Congress enacted the current version of the statutory rent limitation. Pub.L. No. 97-35, § 322(a),

95 Stat. 404. As noted in the Senate Report describing a provision of the Senate bill almost identical to that which was ultimately enacted, "the revised method for determining family rental payments specifies that a family shall pay the highest of the following amounts:. . . ." S.REP. NO. 97-139, 97th Cong., 1st Sess. at 252, *reprinted at* [1981] U.S. CODE CONG. & AD NEWS 548. *See also* H. CONF. REP. NO. 97-208, 97th Cong., 1st Sess. 688, [1981] U.S. CODE CONG. & AD NEWS at 1046.

In summary, the legislative amendments since 1969 maintained for tenants a concrete and specific right to a statutory rent limitation, and increasingly focused upon the tenants as beneficiaries by removing from the definition of that right any reference to the role of the PHA or HUD in fixing rental levels. Although the rent limit now functions as a fixed rent rather than a maximum, there has been no retraction of the clear substantive right of tenants to limited rent. The Brooke Amendment remains the backbone of the public housing program.

C. The HUD Utility Allowance Regulations Of 1980 Implemented The Brooke Amendment With Mandatory And Specific Standards Which Refine The Tenants' Rights To Limited Rents.

The Brooke Amendment itself speaks only of rents; it does not by its terms specifically limit utility charges, nor for that matter parking fees, appliance rentals, maintenance charges or any of the varied fees and charges that could be imposed by an ingenious PHA to circumvent the Brooke limits. It is clear that Congress intended that all such related charges be covered. Congress itself included "the value or cost to [tenant families] of heat, light, water and cooking fuel" in the concept of "rental" in the original USHA, ch. 896, § 2, 50 Stat. 888 (Sept. 1, 1937), later "the value or cost to them of water, electricity, gas, other heating and cooking fuels and other utilities," in 42

U.S.C. § 1402(1) prior to 1959 amendments placing more definitional authority in the Secretary. Congress has continued to define "public housing" to include "all necessary appurtenances thereto," 42 U.S.C. § 1437a(b) (1).

Pursuant to its general regulatory authority, HUD has historically considered "rent" in the public housing program to cover not only shelter cost but also a reasonable amount of utilities. *See* HUD comment to proposed regulations, 49 Fed. Reg. 31400 (1984). At the time this suit commenced, the Secretary of HUD defined "contract rent" at 24 C.F.R. § 860.403(a) (1984) to include:

> . . . the rent charged a tenant for the use of the dwelling accomodation and equipment . . . services, and reasonable amounts of utilities determined in accordance with the PHA's schedule of allowances for utilities supplied by the project. Contract rent does not include charges for utility consumption in excess of the public housing agency's schedule of allowances for utility consumption. . . .

Where as here the PHA supplied utilities, the "contract rent" was the same as the "gross rent" defined at 24 C.F.R. § 860.403(i). The regulations then provided in relevant part:

> § 860.405. Maximum gross rent to income ratio. . . . [T]he rent for any dwelling unit shall not exceed one quarter (25%) of family income as defined in this subpart.

The effect of these sections was that the 25% of income which a tenant was to pay the PHA as rent was to include a reasonable utility allowance. While the PHA could impose additional charges for "excessive" consumption, a charge for any part of a "reasonable utility allowance" would violate the limits established by the Brooke Amendment.

For calculation of allowances by PHAs, HUD had furnished guidance as far back as 1963, in its LOCAL HOUSING MANAGEMENT HANDBOOK, Part II, Section 9. A more formal approach was signaled by HUD's publication of an interim rule, 45 Fed. Reg. 59502 (1980), to establish mandatory standards by regulation. This interim rule contains the regulations upon which the present tenants rely in this suit, namely 24 C.F.R. §§ 865.470 to .482, "Tenant Allowances for Utilities" (full text in statutory appendix at SA4).

This Court has specifically recognized that HUD regulations have mandatory and binding legal effect on PHAs, *Thorpe* v. *Housing Authority*, 393 U.S. 268, 274-76 (1969). The HUD Tenant Utility Allowance rule had all the substantive and procedural characteristics of such a binding regulation, and indeed the Authority has not denied that the rule was both valid and binding. HUD's explanatory comments to the interim rule stated that it "will alleviate confusion and controversy arising under the HUD Guide by establishing mandatory standards and procedures applicable to all PHAs," 45 Fed. Reg. 59502 (1980). The regulations themselves were couched in mandatory language. 24 C.F.R. § 865.473, "Establishment of allowances by PHAs," begins: "(a) Basic *Requirement. PHAs shall establish* (1) allowances for PHA furnished utilities . . . [emphasis added]." "Shall" remains the operative word throughout the regulations. 24 C.F.R. § 865.482 concludes that "PHAs shall proceed to accomplish these results [establishment of allowances] as promptly as possible, but shall establish such allowances effective as of a date no later than 120 days from the effective date of this rule or extended date, if approved by HUD."

The requirements of the allowance regulations are also specific. "These regulations . . . are clear and unambiguous," *Norman* v. *Housing Authority* at p. 9. The combination of PHA consumption data with the formulas of § 865.477 and § 865.480 would have produced the

required allowances, with revisions as needed, had the Authority not chosen to disregard the requirement.

A focus upon the tenant families is also apparent from the relation of the allowance rule to the Brooke Amendment rent limits, and from key wording in the regulations themselves. The relation to Brooke is acknowledged by the familiar inclusion of all components of shelter within the rule's rental definitions, § 865.472, and the inclusion of resulting allowances in the rent schedules, § 865.473(a). The tenants as beneficiaries are to be given notice of proposed allowances, with opportunity to comment, *id.*, and notice of equipment included so that they may keep within the allowances, § 865.473(b). The past tenant consumption pattern is the basis for the allowances, § 865.476, and allowances must be set to meet the needs of 90% of the families in each size unit, § 865.477. Individual tenants may obtain relief from surcharges in certain equitable situations, § 865.481. Perhaps most telling is the HUD justification for early implementation of the interim rule: an urgent need to revise allowances "before the coldest months of winter" to "alleviate tenant hardship," 45 Fed. Reg. 59505 (1980).[15]

The allowance regulations thus have the force and effect of law,[16] implementing and detailing the substantive rights of tenants under the Brooke Amendment from which the regulations derive. They are completely consistent with and even necessary to their statutory source,

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[15] An ancillary purpose of the rule is energy savings, 45 Fed. Reg. 59504, but HUD acknowledged the weakness of its rule to achieve conservation where the PHA furnishes utilities. *Id.* The Brooke purpose obviously predominates; otherwise the rule would set a much lower threshhold for surcharges.

[16] *See generally Chrysler Corp.* v. *Brown*, 441 U.S. 281, 301-03 (1979); *Batterton* v. *Francis*, 432 U.S. 416, 425 n. 9 (1977); *Morton* v. *Ruiz*, 415 U.S. 199, 235 (1974).

and furnish the precise standard by which the statute should be enforced. *Cf. Guardians Ass'n* v. *Civil Service Comm'n*, 463 U.S. 582, 591-92 (1983) (opinion by White, J.); *Samuels* v. *District of Columbia*, 770 F.2d 184, 199 (D.C. Cir. 1985).

In short, both the Brooke Amendment and its implementing regulations regarding utility allowances establish that tenants have "rights . . . secured by the federal . . . laws," § 1983. The test of *Pennhurst* is met. The clear intent of Congress, solidly preserved through years of statutory amendment, funding crisis and HUD reorganization, should be vindicated. This suit is the appropriate vehicle for such vindication.

II. THE DISPOSITION BELOW ERRONEOUSLY REDUCES THE AVAILABILITY OF THE § 1983 REMEDY TO CASES WHERE A PRIVATE RIGHT OF ACTION CAN BE IMPLIED FROM A FEDERAL STATUTE.

A. The Decisions Below Illustrate A Common Confusion Among The Lower Courts In The Relation Of § 1983 And Implied Rights.

The intersection of *Thiboutot*, *Pennhurst*, *Sea Clammers*, and *Cort* v. *Ash* is crowded with commentators decrying the confusion around them.[17] They could find no better illustration of that confusion than this case.

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[17] *See e.g.* Brown, "Whither *Thiboutot:* Section 1983, Private Enforcement, and the Damages Dilemma," 33 DE PAUL L. REV. 31 (1983); Sunstein, "Section 1983 and the Private Enforcement of Federal Law," 49 U.CHI.L.REV. 394 (1982); Wartelle & Louden, "Private Enforcement of Federal Statutes: The Role of the Section 1983 Remedy," 9 HASTINGS CONST. L.Q. 487 (1982); Note, "Preclusion of § 1983 Causes of Action by Comprehensive Statutory Remedial Schemes," 82 COLUM.L.REV. 1183 (1982); Note, "Implied Private Rights of Action and Section 1983: Congressional Intent through a Glass Darkly," 23 B.C.L.REV. 1439 (1982).

The confusion is most evident in the opinion of the district court, which read one of the Fourth Circuit's previous treatments of this issue to hold explicitly that no cause of action will lie under § 1983 where no right of action may be implied form the substantive statute. JA27-28, citing *Home Health Services* v. *Currie*, 706 F.2d 497, 498 (4th Cir. 1983).

The Fourth Circuit opinion perpetuates this error in several respects. First, the panel persists in making a *Cort* v. *Ash* analysis (JA38, n.9) although the tenants have expressly and consistently disclaimed any reliance on that approach. Second, the Fourth Circuit continues to minimize the difference between the implied rights analysis and the review of § 1983 exceptions. "The inquiry under either interpretation of the appellant's position is similar, though not perfectly congruent." JA38, n.9, quoting *Phelps*. Even the concurring opinion, which tries to restore some distinction to the two analytic frameworks, emphasizes instead their similarity: "distinctions exist, however fine" (JA41); "in many instances this would be a distinction without a difference" (JA41); "the two are distinct, however subtly" (JA44).

The inquiry most affected by the Fourth Circuit's convergence of doctrine is with regard to the preclusion of a private tenant remedy. For both the § 1983 *Sea Clammers* inquiry and the implied rights inquiry the court identifies its initial finding as the absence of a statutory private remedy (compare JA35, quoting from *Phelps* v. *Housing Authority* with JA39, n.9). While this evidence may tend to support a finding of no congressional intent to permit private suits implied from the statute, it should have the *opposite* effect in the *Sea Clammers* inquiry: if no alternative private remedy exists, then Congress likely intended § 1983 to have full play. The opinion does not recognize any such distinction, but gives the lack-of-express-remedy evidence the same effect in both inquiries.

This approach is terribly wrong. True, both *Sea Clammers* and *Cort* v. *Ash* require inquiry into congressional intent to permit or preclude remedies. But in a case such as this, where congressional evidence regarding remedies is slim, *Sea Clammers* and *Cort* v. *Ash* should produce dramatically different results. Unless there is an adequate alternative private remedy or comprehensive enforcement scheme in the statute *Sea Clammers* would permit the customary private enforcement by § 1983. Not so under *Cort* v. *Ash*, where absence of explicit congressional intent simply moves the inquiry to other factors, with the burden upon the proponent of the implied right. *Cannon* v. *University of Chicago*, 441 U.S. 677, 688 (1979). These are critical, not subtle, differences. Failure to recognize them inevitably has the effect, as in this case, of reducing the § 1983 shield of the citizen to a redundancy, and overruling *Thiboutot* by implication.

Despite its devastating effect on § 1983, the convergence of the preclusion tests represents one pattern of lower court response to the intersection of *Thiboutot* and *Cort* v. *Ash*.[18] Another pattern of response is extreme divergence—if an implied right of action is found, these courts find that § 1983 is precluded.[19] Still a third

[18] In addition to the district court's opinion in this case *see e.g. Moxley* v. *Vernot*, 555 F.Supp. 554, 559-60 (S.D. Ohio 1982), *cert. denied* 103 S.Ct. 3112 (1983) (lack of implied cause of action under Rehabilitation Act of 1973 bars private action under § 1983). *Cf. Meyerson* v. *Arizona*, 709 F.2d 1235, 1239-40 (9th Cir. 1983) *vacated* 104 S.Ct. 1584, *remanded* 740 F.2d 648 (1984) (concludes private action under § 503 of Rehabilitation Act of 1973 barred whether under implied or under § 1983, on the same limited intent evidence, despite a difference in proof burdens).

[19] *E.g. Longoria* v. *Harris*, 554 F.Supp. 102, 107 (S.D. Tex. 1982) (implied right of action under § 504 of Rehabilitation Act of 1973 precludes § 1983 damages action); *Manecke* v. *School Bd.*, 553 F.Supp. 787, 797 (M.D.Fla. 1982), *reversed* 762 F.2d 912 (11th Cir. 1985) (court has implied equitable remedy under § 504 of same act and this precludes § 1983 damages remedy); *Garrity* v. *Gallen*, 522 F.Supp. 171, 203 (D.N.H.1981).

approach entertains a strong presumption that § 1983 is available in the absence of clear evidence of congressional intent to the contrary.[20] Petitioners believe this last approach best reflects the reasoning of this Court in *Thiboutot*, *Pennhurst*, and *Sea Clammers*.

B. The Proper Approach To The Preclusion Inquiry Is A Presumption That The § 1983 Right Of Action May Be Used To Vindicate Federal Rights.

The most persuasive harmonizing of this Court's § 1983 and implied rights cases is effected by presuming that Congress intended to preserve the § 1983 remedy for enforcement of a federal statute. Such a presumption places the burden on a § 1983 defendant to show that Congress addressed the issue and decided otherwise. It appears from relevant opinions that this view is shared by a majority of the court.

The first is *Sea Clammers* itself. Justice Powell's majority opinion held that the comprehensive judicial remedies under the environmental acts in question demonstrate congressional intent to preclude a § 1983 remedy. Important, however, is Justice Powell's comment that "we do not suggest that the burden is on a plaintiff to demonstrate

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[20] *E.g. Samuels* v. *District of Columbia*, 770 F.2d 184, 195, 194 n.7 (D.C. Cir. 1985) (Section 1983 enforcement of grievance mechanism in USHA presumed to be available in absence of showing that Congress affirmatively intended to foreclose enforcement); *Ryans* v. *New Jersey Comm'n for the Blind*, 542 F.Supp 841, 846-49 (D.N.J. 1982) (Even though no implied right of action exists "The court must presume a § 1983 right of action to exist unless there is evidence in the underlying statute which suggests an intent on the part of Congress to *foreclose* such an action") (emphasis in original); *Boatowners and Tenants Ass'n* v. *Port of Seattle*, 716 F.2d 669, 674 (9th Cir. 1983) (Plaintiff must prove congressional intent to create private right of action when suing directly under the federal statute but not when suing under § 1983).

congressional intent to preserve § 1983 remedies." 453 U.S. at 451, n.31.

Justice Stevens, joined by Justice Blackmun, disagreed on the preclusion treatment in a footnote that remains the most succinct statement of the presumption:

> As the Court formulates the inquiry, the burden is placed on the § 1983 plaintiff to show an explicit or implicit congressional intention that violations of the substantive statute at issue be redressed in private § 1983 actions. The correct formulation, however, places the burden on the defendant to show that Congress intended to foreclose access to the § 1983 remedy as a means of enforcing the substantive statute. Because the § 1983 plaintiff is invoking an express private remedy that is, on its face, applicable any time a violation of a federal statute is alleged, see *Maine* v. *Thiboutot*. . . , the burden is properly placed on the defendant to show that Congress, in enacting the particular substantive statute at issue, intended an exception to the general rule of § 1983. A defendant may carry this burden by identifying express statutory language or legislative history revealing Congress' intent to foreclose the § 1983 remedy, or by establishing that Congress intended that the remedies provided in the substantive statute itself be exclusive.

453 U.S. at 27-28 n. 11. The preceding comment of Justice Powell suggests that the majority did not reject this analysis, but rather considered it inapposite to their disposition.

A similar approach was taken by Justice White (joined by Justices Brennan and Marshall), dissenting from the *Pennhurst* holding that the Developmentally Disabled Act created no rights. Assuming that the Act created rights in the plaintiffs, these justices viewed *Thiboutot* as creating "a presumption that a federal statute creating federal rights may be enforced in a § 1983 action," 451 U.S. at 51. The Court should not foreclose a remedy for

those most effected by the program, regardless of the agency's administrative enforcement remedies. *Id.* This view was not at odds with the opinion of the *Pennhurst* majority because the issue was not reached by the majority.

More recently Justice Blackmun, writing for the majority in *Smith* v. *Robinson*, 104 S.Ct. 3457 (1984), also used language supporting a presumption analysis. Speaking to the issue of preclusion of § 1983 remedies, he wrote that "we do not lightly conclude that Congress intended to preclude reliance on § 1983 as a remedy for a substantial equal protection claim," 104 S.Ct. at 3469. Presumably, since *Thiboutot*, that conclusion may not be reached lightly with regard to statutory rights either.

These opinions recognize that the task of the courts is not simply to look at the substantive federal statute for evidence of congressional intent, but rather to read that evidence against the clear intent of Congress expressed in § 1983 to permit private enforcement. Since repeal of statutes by implication is disfavored, a clear statement of intent would be expected if a legislature intended to extinguish the prior remedy, *TVA* v. *Hill*, 437 U.S. 153, 189-93 (1978).

It is to be expected that § 1983 liability will represent some hinderance and bother to governmental officials. Evidence to that effect should not necessarily be persuasive to preclude a § 1983 remedy, however, because of the history and purposes of § 1983 itself. The Court has repeatedly noted that § 1983 was expressly created to alter federal-state relations by creating a special remedy for state and municipal violation of federal law. Congress fashioned the remedy to "interpose the federal courts between the states and the people, as guardians of the people's federal rights." *Mitchum* v. *Foster*, 407 U.S. 225, 242 (1972). *See generally* Blackmun, "Section 1983 and

Federal Protection of Individual Rights," 60 N.Y.U.L. Rev. 1 (1985). A presumption in favor of the § 1983 plaintiff achieves these historic congressional purposes while leaving the courts some flexibility in individual cases.

Several courts of appeals have found this Court's presumption statements a useful key to reconciling *Thiboutot* and *Cort* v. *Ash*. *Samuels* v. *District of Columbia*, 770 F.2d 184 (D.C. Cir. 1985) (effect of presumption is that § 1983 plaintiffs do not suffer burden of demonstrating congressional intent to preserve private remedy against PHA under USHA); *Keaukaha-Panaewa Community Ass'n* v. *Hawaiian Homes Comm'n*, 739 F.2d 1467, 1470-71 (9th Cir. 1984) (burden on implied rights plaintiff to show congressional intent to create a cause of action; presumption sets burden on governmental § 1983 defendant to show congressional intent that statutory remedy is exclusive); *Boatowners & Tenants Ass'n* v. *Port of Seattle*, 716 F.2d 669, 674 (9th Cir. 1983) (plaintiff with statutory right presumed to have § 1983 right of action, burden on defendant to show preclusion; implied right works the other way). A presumption approach is also strongly urged by scholars,[21] even those critical of the breadth of *Thiboutot*.[22]

Recognition of the presumption in this case would have eliminated the serious confusion between implied rights and § 1983 in the district court, and made clear to the court that it need not address the *Cort* v. *Ash* tests where an implied right is not asserted. In the court of appeals the presumption would have eliminated the court's emphasis on the similarity of the tests, and shifted the

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[21] Wartelle and Louden, "Private Enforcement" *supra* n. 17, at 541; Sunstein, "Section 1983" *supra* n. 17 at 424-25; Note, "Implied Private Rights of Action" *supra* n. 17 at 1469; Note, "Preclusion of Section 1983 Causes" *supra* n. 17 at 1200-01.

[22] Brown, "Whither *Thiboutot?*" *supra* n. 17 at 45.

consequences of congressional silence on remedies. The result, however, would still depend upon an examination of congressional intent such as that which follows.

III. THE AUTHORITY HAS NOT MET ITS BURDEN OF SHOWING CONGRESSIONAL INTENT TO OVERCOME THE PRESUMPTION THAT § 1983 MAY BE USED FOR PRIVATE ENFORCEMENT OF USHA.

The availability of § 1983 under *Thiboutot* to enforce federal statutory rights is subject to the exception articulated in *Sea Clammers* when a § 1983 defendant can show that Congress has foreclosed § 1983 enforcement in the statutory scheme itself. "When the remedial devices provided in a particular Act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under § 1983," 453 U.S. at 20.

It appears to be the *Sea Clammers* exception which the court of appeals found most compelling to disposition in this case. After citing generously from *Phelps* (JA35-36) the court concluded (JA37):

> The § 1437 right is simply incompatible with the § 1983 remedy, for a characteristic of the § 1437 right is precisely that the plaintiffs are not to have the authority themselves to sue. HUD alone may, as quasi trustee, take legal action, for the right is explicitly tailored not to allow the beneficiaries, the low cost housing tenants, to do so.

Again, however, the Fourth Circuit offered little reasoning to back its sweeping conclusion. It made no examination of the particular nature or history of the Brooke Amendment. It simply reviewed its former decisions in *Perry* and *Phelps* and found them to support a much broader preclusion than they purported to announce (JA35-37). The effect of this cavalier treatment is to bar a massive class of tenants from action to enforce not only

the Brooke Amendment, but *any* federal statutory right in the public housing program. This result is plainly wrong, as a more precise *Sea Clammers* analysis will show.[23]

A. Congress Did Not Expressly Preclude Private § 1983 Enforcement.

Neither the Brooke Amendment in particular nor the Housing Act of 1937 in general contain any express preclusion of private enforcement. The legislative history of the Brooke Amendment contains no explicit expression of such intent.[24] Although many § 1983 tenant suits have been brought and reported concerning the Brooke Amendment and other portions of USHA in the sixteen

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[23] Courts seriously considering whether § 1983 is precluded for enforcement of the Brooke Amendment have agreed with petitioners. The Second Circuit found a § 1983 challenge to PHA rent calculations not precluded because the Brooke Amendment "contains no comprehensive enforcement mechanism to enforce statutory rent limitations," *Beckham* v. *New York City Housing Authority*, 755 F.2d at 1077. Likewise in *McGhee* v. *Housing Authority*, 543 F.Supp. at 609, the court found "no scheme in [the Brooke Amendment and other housing statutes] which appears to be set up for the purpose of enforcing private rights of any kind." *Cf. Samuels* v. *District of Columbia*, 770 F.2d at 195-96 (§ 1983 not precluded to enforce grievance procedure requirement of USHA against PHA); *Pietroniero* v. *Oceanport*, 764 F.2d 976, 980 (3rd Cir. 1985), *cert. denied* ____ *U.S.* ____ *(§ 1983 not precluded to enforce various housing and relocation acts against municipality).* By contrast, the only decision which finds § 1983 precluded for private Brooke Amendment enforcement stands *Sea Clammers* on its head: in *Jackson* v. *Housing Authority*, order at pp. 3-4, the court denies § 1983 *because* USHA does not create a private right of action.

[24] *Howard* v. *Pierce*, 738 F.2d at 729 (Sixth Circuit finds no intent in USHA to preclude private enforcement of Brooke: "we cannot assume that legislative silence in an act which provides no elaborate enforcement provisions indicates a congressional intent to preclude enforcement of every substantive provision.")

years of congressional tinkering with Brooke, Congress has not seen fit to disown them.

The one modest exception proves the rule. In the Omnibus Budget Reconciliation Act of 1981, Congress authorized an increase in the public housing and assisted housing limits from 25% of tenant income to 30%. In order to avoid hardship to tenants, lease violation, or impracticability in implementation, Congress gave the Secretary of HUD the authority for delayed or staged implementation. The Act specifically provided that "the Secretary's actions and determinations and the procedures for making determinations pursuant to this subsection shall not be reviewable in any court." Pub.L. No. 97-35, Title III, § 322(i)(3), 95 Stat. 358, 404 (Aug. 13, 1981). This specific preclusion of judicial intervention was repealed two years later. Pub.L. No. 98-181, Title II, § 206(e), 97 Stat. 1153, 1181 (Nov. 30, 1983).

This specific and temporary preclusion shows that with regard to public housing rent limits, Congress has duly considered private actions brought to enforce or challenge portions of the Act. Congress closed the door briefly and then reopened it; open should it remain.

B. Congress Did Not Supplant § 1983 With Alternate Private Remedies.

Critical to the § 1983 preclusion of *Sea Clammers* was the existence of a multitude of express private remedies in the statutes which plaintiffs sought to enforce. 453 U.S. 1, 20-21. *See also Smith* v. *Robinson*, 104 S.Ct. at 3457 (express private remedy in the Education of the Handicapped Act demonstrates congressional intent to supplant § 1983 remedy).

The respondent Authority has repeatedly urged that the tenant administrative grievance mechanism mandated by USHA at 42 U.S.C. § 1437d(k) is an enforcement

vehicle intended by Congress to supplant § 1983. The Fourth Circuit did not mention this possibility, for good reason. The grievance procedure is a system for complaint to the local PHA management, and ultimately to a local grievance panel, but never to HUD. The grievance procedure was not required by USHA until a 1983 amendment, Pub.L. No. 98-181, § 204, 97 Stat. 1153, 1178 (Nov. 30, 1983), some 14 years after the Brooke Amendment was passed. The purpose was not to cut off other remedies, but simply to prevent HUD from scuttling a useful procedure that had existed under regulations for many years. *Samuels* v. *District of Columbia*, 770 F.2d at 197-98. In addition, the grievance mechanism elaborated in HUD regulations may only be used for individual complaints, not class objections to policy, 24 C.F.R. § 966.53(a), § 966.51(b) (1985). In explanatory comments upon its revision of the utilities allowance regulations, HUD itself notes that the grievance mechanism is not available for challenges to the general utility allowance schedules. 49 Fed. Reg. 31399, 31407 (1984).[25] *See also McGhee* v. *Housing Authority*, 543 F.Supp. at 609 (grievance procedure "does not in any way affect the determination of whether Congress intended for tenants to further air such grievances in the federal courts").

Neither the Brooke Amendment nor USHA generally provide *any* private judicial or administrative remedy which might have been available to the present tenants as

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[25] Even less convincing is the district court's reasoning (JA25-26) that Congress showed its intent to preclude by the administrative remedy of 24 C.F.R. § 865.481 (1983). This portion of the utility allowance regulation (SA12 to this brief) affords a tenant with a defective meter the opportunity for relief from surcharges. It may help a tenant with a defective utility meter; it assuredly would not help a tenant with a defective utility allowance. This provision bears as remote a relation to the "comprehensive remedial scheme" contemplated by *Sea Clammers* as it does to the intent of Congress.

an alternative to § 1983. There is simply none of the evidence of congressional intent to supplant required by this Court in *Sea Clammers* or by the presumption test urged by Justice Stevens in that case. While purporting to rely upon the *Sea Clammers* test, the Fourth Circuit's opinion fails even to discuss the total absence of an alternate private remedy. Whether this Court uses a presumption approach or not, the absence of any express private enforcement scheme shows that § 1983 actions are permitted.

C. Congress' Grant Of General Regulatory Authority To HUD Does Not Demonstrate Intent To Supplant § 1983.

The only argument offered by the Fourth Circuit panel for preclusion derives from the general regulatory authority of HUD over the public housing program (JA35-36). Through its annual contributions contract, HUD can crack the whip and withhold further subsidies if a PHA violates USHA or HUD regulations (JA35). This argument fails to meet the standards of *Sea Clammers*, fails on the facts, and altogether disregards the particular nature of the Brooke Amendment.

First, the reasoning of *Sea Clammers* cannot be pushed so far. Justice Powell's opinion recognizes the Court is reconciling one express congressional authorization, § 1983, with the express remedial provisions of the environmental acts in question. 453 U.S. at 20. It is one thing to say that Congress has expressly supplanted its previous § 1983 legislation; it is quite another to say that the express mandate of § 1983 is implicitly overriden, just by virtue of a very generalized regulatory authority given to a federal agency. This Court has not gone so far, nor should it.

Second, the ACC on which the Fourth Circuit leans so heavily will not bear the weight. The Brooke Amendment is not located in that section of USHA describing those requirements HUD will enforce through contract provisions of the ACC, 42 U.S.C. § 1437d, but is instead located

in § 1437a. The ACC does bind the Authority to comply with USHA generally (§ 5, JA45), although compliance with HUD regulations is curiously omitted. HUD can indeed enforce the ACC by suit (§ 508, JA46) or by taking over the project in the event of substantial default (¶¶ 501, 502 of the ACC, in record with the 11-16-84 affidavit of Herbert R. McBride). But the withdrawal of subsidies, the "most drastic possible means" cited by the court of appeals, is specifically *barred* once a project is completed (§§ 504, 510). *See also* 42 U.S.C. § 1437g(a)(1) (requiring ACC to guarantee payment subject to availability of funds); *Ashton* v. *Pierce*, 723 F.2d 70 (D.C.Cir. 1983), *amending* 716 F.2d 56 (1983) (HUD withdrawal of funding not an available sanction). The administrative controls over public housing, in short, are not even as extensive as those in most other cooperative federal funding programs.

Finally, an exclusive HUD enforcement role is particularly inappropriate to the nature of the Brooke Amendment. HUD has a significant financial disincentive to enforce Brooke. The more that tenants pay towards the operating expenses of a PHA, the less that HUD will have to contribute to make up the difference. 24 C.F.R. § 990.110(d) (1985). The only players with a stake to lose by overcharges are the tenants themselves. If through illegal utilities surcharges or other Brooke violations the tenants pay too much, it is *their money* to be recovered, not the government's; who should have a better claim?[26]

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[26] This is the Achilles' heel of the Fourth Circuit's suggestion (JA36,37) that HUD is a "quasi-trustee" of public housing, with sole enforcement authority against third parties for the benefit of tenants. The analogy is inapt: whatever it says about the federal financial contribution, it says nothing about the rent paid by tenants themselves. Their leasehold is also property within their present entitlement. It could as well be said that the PHA is a co-trustee for benefit of the tenants. The analogy and case cited for it (*In re Romano*, 426 F.Supp. 1123, 1128 (N.D.Ill. 1977), *modified* 618 F.2d 109 (8th Cir. 1980) may describe the Fourth Circuit's result, but explain nothing.

The administrative enforcement argument assumes, of course, that there is some triggering mechanism for program beneficiaries such as the tenants to set HUD enforcement in motion. USHA establishes no procedure for tenants themselves to obtain an administrative review or enforcement remedy from HUD. HUD's regulations are similarly silent on this point. In the absence of some such avenue of petition for redress, a § 1983 preclusion would be particularly unfair,[27] and not likely to be the congressional intent. *Howard* v. *Pierce*, 738 F.2d at 729; *cf. Rosado* v. *Wyman*, 397 U.S. 397, 406 (1970); *Pietroniro* v. *Oceanport*, 764 F.2d 976, 980 (3rd Cir. 1985), *cert. denied* ___ U.S. ___ (1985).

Even if some administrative remedy did exist, that should not normally preclude recourse to § 1983. This Court has continued to hold that exhaustion of state administrative remedies is not a prerequisite to bringing a suit under § 1983, *Patsy* v. *Board of Regents*, 457 U.S. 496 (1982). It would create a bizarre anomaly if a § 1983 litigant were precluded by the same administrative remedy which he would not otherwise be required to exhaust.

D. HUD Does Not Assert The Exclusive Jurisdiction Over USHA That The Court Of Appeals Ascribes To It.

The Fourth Circuit would give HUD exclusive enforcement authority despite the absence of a "comprehensive

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[27] The futility of a HUD remedy without a tenant trigger is shown by this case. Counsel for tenants was asked at argument on appeal whether a tenant complaint had been made to HUD, and responded that a complaint had been made, but no answer of any kind received. The Fourth Circuit concluded from this that HUD declined to intervene. "HUD's decision presumably reflected an intricate economic 'shifting and weighing' process in which it assessed the utility of proceeding further on the tenants' behalf" (JA 36). The Fourth Circuit's conclusion is utterly without foundation in the record, and wholly specious. The only conclusion which can be drawn is that HUD does not acknowledge tenant complaints.

enforcement scheme" relating to the Brooke Amendment. This position is not only inconsistent with *Sea Clammers;* it is not the position taken by HUD itself.

In its last revision of utility allowance regulations, HUD initially proposed to limit tenant challenge to PHA allowances to state court review under an arbitrariness standard. 47 Fed. Reg. 35249, 35252 (1982). In the final rule, HUD abandoned this limitation, noting in its comments that "some plaintiffs may prefer to challenge PHA determinations in Federal rather than State Court and . . . the Department's power to preclude access to Federal Court is doubtful." 49 Fed. Reg. 31403 (1984). HUD has also given up its prior approval of utility allowances. *Compare* 24 C.F.R. § 865.473(a) (1982) with 24 C.F.R. § 965.473(d) (1985).

In a suit brought by tenants against HUD and a Georgia Housing Authority for non-compliance with the Brooke Amendment regarding utility allowances, HUD has taken the position that it has no statutory duty even to enforce the Brooke Amendment. "Not only does this [Brooke] Amendment, and indeed, the entire USHA, not 'command' HUD to enforce the limitations of the Act, it does not even suggest that HUD do so in permissive terms."[28] HUD took the same position on appeal of *Stone* v. *District of Columbia*. HUD agreed that Brooke bestowed a benefit only on tenants, and disavowed authority to ensure PHA compliance in setting rents or utility allowances.[29] *Cf. Ashton* v. *Pierce*, 716 F.2d 56, 66 (D.C.Cir. 1983) ("The Department has argued . . . that it

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[28] *Brown* v. *Housing Auth.*, No. 85-8186 (pending in 11th Cir.) brief filed July 15, 1985 for federal appellee Pierce, at p.24. [Relevant material lodged with the clerk of this Court].

[29] *Stone* v. *District of Columbia*, No. 83-1999 (D.C. Cir.) brief filed February 10, 1984 for federal appellees Pierce and White, pp. 39-41. [Lodged with the clerk].

has no legal duty to monitor or enforce the Authority's compliance with the [HUD lead paint] regulations").

This reluctant enforcement posture not only undercuts the disposition of this case below; it explains why tenants in housing projects around the country have been forced to seek redress in federal court (*see Brown*, *Stone*, and other cases collected at n. 12 *supra*). If the congressional mandate of Brooke is to be carried out, it will be because the courts, at least, see their duty clear.

E. Section 1983 Preclusion Is Not Required Because Of The Relief Sought By These Tenants.

The remaining tenant claim is for return of their payments for illegal rent surcharges. While this might be characterized as damages, it is really a form of restitution; either way, it is clearly within the scope of § 1983 relief. Where legal rights have been invaded and a cause of action is available a federal court may use any available remedy to afford full relief. *Bell* v. *Hood*, 327 U.S. 678, 684 (1946).

This is not a case where § 1983 relief is at odds with the remedial scheme of a particular statute sought to be enforced, *e.g. Smith* v. *Robinson*, 104 S.Ct. at 3464-65 (cannot maintain § 1983 suit just for § 1988 attorney fees when § 1983 action essentially duplicates statutory claim under Education of the Handicapped Act); *Guardians Ass'n* v. *Civil Service Comm'n*, 463 U.S. 582 (1983) (§ 1983 "make whole" remedies inconsistent with Title VI source of right, in absence of intentional discrimination.) In this case there is no alternative statutory remedy.

Here the damage remedy effectively serves the policy purposes of the Brooke Amendment and USHA. The respondent Authority did not sail into unknown waters with only a vague and aspirational federal chart to guide its course; both the Brooke Amendment and the HUD utility allowance regulations were clear in their mandatory nature and in their specific procedural and substantive requirements. The Authority knew what it was supposed to do, and obstinately refused to do it, fully aware that it was extracting preciously limited funds from families so poor that they could not risk their subsidized tenancy by complaining. This was intentional dereliction of exactly the sort that § 1983 was intended to redress.

Nor will redress by repayment impose any serious burden on the federal public housing program. The Authority has at least three ways to repay the illegal rent surcharges. To the extent that it has escrowed the disputed payments as agreed in the district court, those funds can return to the injured from whom they came. An attractive alternative would be granting of rent credits against future rent obligations for those tenants still residing in Authority projects. This adjustment in operating income can be offset with an adjusted claim for HUD operating subsidies, 24 C.F.R. § 990.110(d) (1985). Finally, the Authority could apply to HUD directly for funds needed to reimburse the tenants. The last avenue was the basis of settlement in *Stone* v. *District of Columbia*, No. 83-1999 (D.C. Cir., order entered June 15, 1984) (lodged with the clerk of this Court). In that case $1.9 million of additional subsidy was approved by HUD to refund illegal surcharges to public housing tenants in the District.

In a program where all the funds are either federal in source or come from the tenants themselves, the remedies of § 1983 are minimally intrusive on the federal relationship. They are essential, however, if either the will of Congress or the specific rights of program beneficiaries are to be respected.

IV. THE FEDERAL COURTS MUST ENTERTAIN A LEASE-BASED CLAIM WHICH UNAVOIDABLY RAISES A SUBSTANTIAL FEDERAL QUESTION UNDER THE HOUSING ACT OF 1937 AND IMPLEMENTING REGULATIONS.

For the second claim of their complaint (JA10), the tenants asserted that the failure of the Housing Authority

to furnish electrical utilities service reasonably necessary for lighting and general household appliances at no additional charge violated the Authority's obligation to the tenants under paragraph 4 of its standard lease. That paragraph provided as follows:

> Utilities: *Management Agent agrees to furnish at no charge to the Resident the following utilities as reasonably necessary: hot and cold water, gas for cooking, and electricity for lighting and general household appliances* and heat at appropriate times of the year, and also range and refrigerator. Resident will be required to pay for all excess consumption of utilities above the monthly allocated amount as developed by the Authority and determined by the individual check meter servicing the leased unit. The schedule of allocations and charges for excess consumption is posted on the bulletin board of each Housing Development office. [emphasis added]

The district court viewed this claim solely as an invocation of pendent jurisdiction, and in a footnote (JA28, n. 9) dismissed the claim under its discretion over pendent state claims recognized in *United Mine Workers* v. *Gibbs*, 383 U.S. 715 (1966). The court of appeals affirmed this holding with little analysis, inquiring only whether the lease created a landlord-tenant relationship between the tenants and the Authority (JA34). If so, any tenant remedy under the lease was to be had in state court, under the Fourth Circuit's earlier decision in *Perry* (JA38).

In fact the lease claim was not simply a pendant state law claim, but instead a full-blown invocation of federal question jurisdiction[30] completely independent of the § 1983 right of action. By its erroneous dismissal, the

[30] 28 U.S.C. § 1331—Federal Question. The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States.

Fourth Circuit implicitly reduced most contract cases concerning federal questions to a discretionary pendent jurisdiction status, contravening the standards recently set by this Court in *Franchise Tax Bd* v. *Construction Lab'rs Vacation Trust*, 463 U.S. 1 (1983).

A. The Lease Controversy Gives The Tenants A Right Of Action.

The tenants' claim on their lease is a classic contract right of action recognized in the common law, *see generally* 1 AM. JUR. 2d "Actions" § 2, § 8 (1962) and in Virginia, *see generally* 1A MICHIES JURIS. "Actions" §§ 8-11 (1980). Regardless of why the Housing Authority put the particular lease provision there, it creates a right personal to and enforceable by the tenants.

Federal courts, furthermore, recognize the state law-based right to sue on contract, when federal jurisdiction is otherwise present, under the doctrine of *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938). *Cf. Woods* v. *Interstate Realty Co.*, 337 U.S. 535 (1949) (federal courts entertain diversity action only if plaintiff has state-based standing to pursue state cause of action).

B. The Lease Claim "Arises Under" The Federal Statutory Scheme, Giving The Court Federal Question Jurisdiction.

The tenants' complaint in its second claim relies upon state law for their right to sue, but the substance of the lease provision upon which the claim is based is a matter of federal law rather than state law. The law in question, of course, is the Brooke Amendment to USHA and its implementing regulations. The complaint alleged that the inclusion of "reasonable amounts of utilities" in public housing rent is a requirement of federal law (¶ 9, JA6); that the defendant Authority's establishment of allowances is governed by federal law (¶ 10,JA6); and that

the defendant Authority was required to follow the method prescribed in federal law in calculating allowances (¶¶ 11-13, JA6). The undertaking of paragraph 4 of the Authority's lease ("agrees to furnish . . . utilities as reasonably necessary . . .") can only be determined against these mandatory federal descriptions of what constitutes "reasonable amounts of utilities." By contrast there is no Virginia state or local law which regulates the provision of electricity allowances by landlords or sets any meaningful points of reference for this lease provision.

The Supreme Court has long recognized that a case "arises under" federal law where the vindication of a right under state law necessarily turns on some construction of federal law. *See e.g. Smith* v. *Kansas City Title & Trust Co.*, 255 U.S. 180 (1921); *Hopkins* v. *Walker*, 244 U.S. 486 (1917). Yet another formulation tests whether the federal matter "necessarily appears in plaintiff's statement of his own claim in the bill or declaration," *Taylor* v. *Anderson*, 234 U.S. 74, 75-76 (1914); or whether the right or immunity created by federal law amounts to "an element, and an essential one, of the plaintiff's cause of action," *Gully* v. *First Nat'l Bank*, 299 U.S. 109, 112 (1936). Only three years ago this Court said that a plaintiff's cause of action created by state law nonetheless "arises under" the laws of the United States

> if a well-pleaded complaint establishes that its right to relief under state law requires resolution of a substantial question of federal law in dispute between the parties.

Franchise Tax Bd. v. *Construction Lab'rs Vacation Trust*, 463 U.S. 1, 13 (1983). *See generally* 13B WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE, § 3562 (1984).

The federal question in this case is pled as an essential element of the tenants' lease claim in the original complaint, and has been methodically asserted as much from

the very first briefing in the district court. See in the record Plaintiffs' Brief in Support of Summary Judgment, p. 20; Brief of Appellants, p. 28. The federal question posed is not mere anticipation of a defense. Since the tenants had the requisite right of action on their lease and had showed the existence of a substantial federal question essential to their claim, the courts below had no discretion to decline federal question jurisdiction.

C. The Fourth Circuit's Refusal To Hear The Lease Claim Erroneously Abolishes Federal Question Jurisdiction In Most Contract Cases.

The implications of refusing to entertain the present lease claim are significant; by its treatment, the Fourth Circuit has effectively abolished federal question jurisdiction in those contract cases where only the substantive right is federal in nature. Apparently the Fourth Circuit would exercise federal question jurisdiction only where both the underlying right and the right to sue are federal in nature. Thus federal jurisdiction over labor contracts governed by the Labor Management Relations Act might be denied; *Avco Corp* v. *Aero Lodge No. 735, Int'l Ass'n of Machinists*, 390 U.S. 557 (1968), which was specifically approved in the *Franchise Tax Board* case, would be dishonored. Similarly, stockholder suits to enjoin investment in securities of an unconstitutional nature would be barred by the Fourth Circuit treatment, overturning the classic holding of *Smith* v. *Kansas City Title & Trust Co.*, 255 U.S. 180 (1921).

Such a rule has no basis in this Court's controlling decisions, and is specifically contrary to the *Franchise Tax Board* holding. The Fourth Circuit's truncation of federal jurisdiction was entirely erroneous and must be reversed in order to return coherence to the law of federal jurisdiction.

D. A Holding That This Lease Provision Raises A Federal Question Will Not Transform All Public Housing Lease Disputes Into Federal Cases.

The Authority's repeated warning that every screen repair will become a federal case is fatuous. Petitioners do not assert that the federal funding and statutory scheme for public housing transform the entire lease between every PHA and its tenants into a "federal contract" always enforceable in federal court, *see e.g. Int'l Ass'n of Machinists* v. *Central Airlines, Inc.*, 372 U.S. 682 (1963); *cf. Jackson Transit Auth.* v. *Local 1285 ATU*, 457 U.S. 15 (1982). While the lease as a whole reflects the federal background of the program, most of its provisions stand on their own and do not depend for their meaning on any underlying federal law. Paragraph 4 of the lease is unusual in the extent to which it must incorporate the specific and mandatory standards found only in the federal law, in order to have any legitimate meaning.

In its reliance upon federal law this lease provision is completely different, for example, from that in the Fourth Circuit's *Perry* case. The focus of the *Perry* lease argument was upon the maintenance of public housing units in decent condition—an argument for which the applicable standards were those of state and local law, not federal law. 664 F.2d at 1216-17. The present tenants need not argue with the Fourth Circuit's treatment of that claim as one of discretionary pendent jurisdiction, or the relegation of that lease claim t[illegible] state courts. Not all public housing lease claims raise [illegible]egitimate federal questions. This one does.

Federal court treatment of this lease claim is also justified to preserve the effort of Congress to create, in the Brooke amendment, a single national standard for tenant rents; and the intent of HUD to "alleviate confusion" in utility allowances by maintaining "mandatory standards . . . applicable to all PHAs," 45 Fed. Reg. 59502 (1980).

Relegating this claim to state court would inevitably produce a welter of varied standards. Virginia recognizes no class action remedy, so as many as 1100 individual tenant suits might be necessary to obtain relief for all affected by this one PHA. Since individual tenant claims would seldom reach the $1000 jurisdictional threshhold of Virginia's trial court of record, they would be resolved in the lowest court not of record, which has no experience and little capacity for federal law issues. Those judges would be as offended as common sense itself at the pretense that only they should construe the Brooke Amendment and utility regulations relating to this lease provision. This approach would be no service to the cause of federalism, the intent of Congress, or the vindication of federal rights.

CONCLUSION

For these reasons, this Court should reverse the judgment of the Court of Appeals for the Fourth Circuit and remand the case to the District Court for the Western District of Virginia for disposition of petitioners' motion for summary judgment or other resolution upon the merits.

Respectfully submitted,

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STATUTORY APPENDIX

STATUTORY APPENDIX

28 U.S.C. § 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

42 U.S.C. § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an acton at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1437a. (effective January 1, 1980) [Brooke Amendment portion emphasized]

When used in this Act—

(1) The term, 'low-income housing' means decent, safe and sanitary dwellings within the financial reach of families of low income, and embraces all necessary appurtenances thereto. Except as otherwise provided in this section, income limits for occupancy and rents shall be fixed by the public housing agency and approved by the Secretary. *The rental of any dwelling unit shall not exceed that portion of the resident family's income which the Secretary establishes on the basis of the relative level of income of the family, but such rental shall not exceed 25 per centum of family income in the case of a very low income family or, in the case of other families, 30 per centum of such income.* Notwithstanding the preceding sentence, the rental for any dwelling unit shall not be less than the higher of (A) 5 per centum of the gross income of the family occupying the dwelling unit, and (B) if the family is receiving payments for welfare assistance from a public agency and a part of such

payments, adjusted in accordance with the family's actual housing costs, is specifically designated by such agency to meet the family's housing costs, the portion of such payments which is so designated. At least 20 per centum of the dwelling units in any project placed under annual contributions contracts in any fiscal year beginning after the effective date of this section shall be occupied by very low-income families. In defining the income of any family for the purpose of this Act, the Secretary shall consider income from all sources of each member of the family residing in the household, except that there shall be excluded—

(A) the income of any family member (other than the head of the household or his spouse) who is under eighteen years of age or is a full-time student;

(B) the first $300 of the income of a secondary wage earner who is the spouse of the head of the household;

(C) an amount equal to $300 for each member of the family residing in the household (other than the head of the household or his spouse) who is under eighteen years of age or who is eighteen years of age or older and is disabled or handicapped or a full-time student;

(D) nonrecurring income, as determined by the Secretary;

(E) 5 per centum of the family's gross income (10 per centum in the case of elderly families);

(F) such extraordinary medical or other expenses as the Secretary approves for exclusion; and

(G) an amount equal to the sums received by the head of the household or his spouse from, or under the direction of, any public or private nonprofit child placing agency for the care and maintenance of one or more persons who are under eighteen years of age and were placed in the household by such agency.

42 U.S.C. § 1437a. Rental payments; definitions (effective October 1, 1981)

(a) Dwelling units assisted under this Act shall be rented only to families who are lower income families at the time of their initial occupancy of such units. Reviews of family income shall be made at least annually. A family shall pay as rent for a dwelling unit assisted under this Act (other than a family assisted under section 8(o) [42 USC § 1437f(o)]) the highest of the following amounts, rounded to the nearest dollar:

(1) 30 per centum of the family's monthly adjusted income;

(2) 10 per centum of the family's monthly income; or

(3) if the family is receiving payments for welfare assistance from a public agency and a part of such payments, adjusted in accordance with the family's actual housing costs, is specifically designated by such agency to meet the family's housing costs, the portion of such payments which is so designated.

. . .

24 C.F.R. § 860.403 Definitions (1982) (redesignated 24 C.F.R. § 960.403 effective March 26, 1984)

The definition of family and other related terms contained in Part 812 of this chapter shall be applicable to this subpart. For the purpose of this subpart the following terms shall have the following meaning.

(a) **Contract rent.** Contract rent means the rent charged a tenant for the use of the dwelling accomodation and equipment (such as ranges and refrigerators but not including furniture), services, and reasonable amounts of utilities determined in accordance with the PHA's schedule of allowances for utilities supplied by the project. Contract rent does not include charges for utility consumption in excess of the public housing agency's schedule of allowances for utility consumption, or other miscellaneous charges. This definition of contract rent is not the same as contract rent for purposes of Parts 880 and 889 of Title 24.

(i) **Gross rent.** Gross rent means contract rent plus the PHA's estimate of the cost to the tenant of reasonable quantities of utilities determined in accordance with the PHA's schedule of allowances for such utilities, where such utilities are purchased by the tenant and not included in the contract rent. This definition of gross rent is not the same as gross rent for the purposes of Parts 880 to 889 of Title 24.

24 C.F.R. §§ 865.470-.482 (1983) All were redesignated as 24 C.F.R. § 965.470-.482 effective March 26, 1984; 24 C.F.R. § 965.470-.480 were amended by 49 Fed. Reg. 31408-10, August 7, 1984.

24 C.F.R. § 865.470 Purpose. (1983)

The purpose of §§ 865.470 through 865.482 is to establish procedures to be used by PHAs in establishing and administering Allowances for PHA-Furnished Utilities and Allowances for Tenant-Purchased Utilities. Allowances for PHA-Furnished Utilities represent the maximum consumption units (e.g., kilowatt hours of electricity) which may be used by a dwelling unit without a surcharge for excess consumption against the tenant. Allowances for Tenant-Purchased Utilities represent fixed dollar amounts which are deducted from the Gross Rent otherwise chargeable to a tenant who pays the actual Utility charges directly to the Utility suppliers whether they be more or less than the amounts of the Allowances.

24 C.F.R. § 865.471 Applicability. (1983)

(a) Except as provided in paragraph (b) of this section, §§ 865.470 through 865.482 apply to all dwelling units assisted under the United States Housing Act of 1937 in projects owned by or leased to PHAs and leased or subleased by PHAs to tenants, except the Section 8 Housing Assistance Payments Program and the Mutual Help Homeownership Opportunities Program.

(b) Sections 865.470 through 865.482 do not apply to dwelling units which are served by PHA-Furnished Utilities unless Checkmeters have been installed to measure the actual Utilities consumption of the individual units but tenants in such units are subject to charges for consumption of tenant-owned major appliances in accordance with § 866.4 of this chapter.

24 C.F.R. § 865.472 Definitions. (1983)

Checkmeter. A device for measuring Utility consumption of each individual dwelling unit where the Utility service is supplied through a Mastermeter System. The PHA pays the Utility supplier for the Utility service on the basis of the Mastermeter readings and uses the Checkmeters to determine whether and to what extent of the Utility consumption of each dwelling unit is in excess of the Allowances for PHA-Furnished Utilities.

Contract Rent. The amount of rent payable by the tenant to the PHA. In the case of PHA-Furnished Utilities, the Contract Rent is the same as the Gross Rent. In the case of Tenant-Furnished Utilities the Contract Rent is the Gross Rent minus the amount of the Allowances for Tenant-Purchased Utilities. This definition of Contract Rent is not the same as contract rent for purposes of 24 CFR Parts 880 to 889.

Gross Rent. The rent chargeable to a tenant for the use of the dwelling accommodation and equipment (such as range and refrigerator, but not including furniture), services, and Utilities not to exceed the Allowances for PHA-Furnished Utilities or the Allowances for Tenant-Purchased Utilities, as applicable. This definition of Gross Rent is not the same as gross rent for purposes of 24 CFR Parts 880 to 889.

Mastermeter System. A Utility distribution system in which a PHA is supplied Utility service by a Utility supplier through a meter or meters and the PHA then distributes the Utility service to its tenants.

Surcharge. The amount charged by the PHA to a tenant, in addition to the tenant's Contract Rent, for consumption of Utilities in excess of the Allowance of PHA-Furnished Utilities included in the Contract Rent.

Utility. Electricity, gas, heating fuel, water and sewage service, and trash and garbage collection. Telephone service is not included as a Utility.

24 C.F.R. § 865.473 Establishment of allowances of PHAs. (1982) (revised 47 Fed. Reg. 19123, May 4, 1982)

(a) **Basic Requirement.** PHAs shall establish (1) allowances for PHA-Furnished Utilities for all Checkmetered Utilities and (2) allowances for Tenant-Purchased Utilities for all Utilities purchased directly by tenants from the Utilities supplier. These Allowances shall be incorporated into the PHA's rent schedules and shall be submitted for approval by the HUD field office, after compliance with requirements of notice to tenants prescribed under 24 CFR Part 861.

(b) **Authorized Uses of Utilities on which Allowances Are Based.** Allowances for both PHA-Furnished and Tenant-Purchased Utilities shall be designed to include Utility consumption requirements for major equipment furnished by the PHA (for example, heating furnace, hot water heater, range and refrigerator) and for minor items of equipment (such as toasters and can openers) furnished by the tenants. To avoid misunderstanding, the PHA shall include with the rent schedules a statement of the specific items of major equipment whose Utility consumption requirements were included in determining the amounts of the Allowances. This does not mean that tenants may not supply and use other items of major equipment, but if they do so the cost of any Utility consumption in excess of the applicable allowance will have to be borne by the tenant.

24 C.F.R. § 865.474 Dwelling Unit categories for establishment of allowances. (1983)

(a) **Structure type Categories.** Separate Allowances shall be established for each utility and for each category of dwelling units within structures which are reasonably comparable as to age and construction type, have the same utility combination and the same type and size of major equipment.

Walk-up apartments, elevator buildings, row or townhouse dwellings, and detached or semi-detached dwellings shall constitute different structure types, but consideration may also be given to other major construction differences which have a significant effect on utility consumption. Generally, PHAs should include in the same structure type category all structures of similar design and equipment which were constructed at about the same time and are located within an area which experience very similar weather conditions.

(b) **Scattered site units.** In the case of scattered site dwelling units which were acquired by the PHA, with or without rehabilitation, the PHA shall determine to what extent the units are comparable so as to permit their being treated as one structure type category for purposes of establishing Allowances. If the number of units which can be reasonably so grouped is insufficient for this purpose (i.e., generally, less than 25 units), the PHA should include in its data base the best available Utility consumption data with respect to comparable units not in the PHA's program. In such cases, the PHA shall monitor the consumption experience of the units within its program as well as the non-PHA units, and thereafter revise its data base in light of that experience (see § 865.476).

(c) **Dwelling Unit Categories by Size of Dwelling Unit.** Within each structure type category, separate Allowances shall be established for units of different size, i.e., Efficiency or 0-bedroom, 1-bedroom, 2-bedroom, 3-bedroom, 4-bedroom, 5 or more-bedroom. Variations shall not be made for such factors as dimensions of the rooms or dwelling units and generally not by reason of factors such as upper or lower floor, number of exposed walls, or direction of exposure. However, if the PHA determines that there are sufficient differences between dwelling units it may designate a category to reflect those differences.

24 C.F.R. § 865.475 Characteristics of allowances. (1983)

(a) **For PHA-Furnished Utilities.** Preference shall be given to setting Allowances on a quarterly basis appropriately

adjusted to reflect season variations, because this results in lower costs for meter reading and bookkeeping, and may also reduce the number of tenants surcharged due to averaging consumption over the three-month period. Monthly Allowances may be used where justified by special circumstances such as high tenant turnover or where excess consumption is extremely high. If in a locality the billing for a Utility, such as water and sewage service, is on a longer-term basis, such as semi-annually, the Allowance computed for that Utility may be set for a corresponding period and prorated to the quarterly allowance.

(b) **Tenant-Purchased Utilities.** The amount of the Allowance for Tenant-Purchased Utilities is deducted from the Gross Rent in computing the amount of the Contract Rent payable by the tenants to the PHA. Monthly Allowances shall be established at a uniform amount, based on average monthly utility requirements for a year; however where utility company level payment plans (customers of a utility company pay to the utility company a uniform amount each month) are unavailable to PHA tenants and a uniform monthly allowance may result in hardships the allowances established may provide for seasonal variations. HUD, if approving this action, will provide the PHA with instructions regarding adjustments necessary in the rental income estimates used for computation of operating subsidy payable under the Performance Funding System.

24 C.F.R. § 865.476 Data upon which allowances shall be based (PHA-Furnished and Tenant-Purchased Utilities). (1983)

(a) **Where records are available for the particular housing.** The portion of the Allowance applicable to each Utility shall be based upon the consumption records (consumption and cost records in the case of Tenant-Purchased Utilities) for the particular structure type category (§ 865.474) for the most current th ee-year period. Because of seasonal variations in the use of Utilities, each year shall consist of 12 consecutive months. If records are not available for a three-year period, the

PHA shall use records for the most current two-year period or, if such records are unavailable, for the most current one-year period. If records are not available for the particular housing category for the entire year, records for the most comparable PHA housing will be used. Allowances based on records for only a one-year period should be adjusted for normal weather conditions.

(b) **Where records are not available for the particular housing.** For new housing or existing housing for which adequate records covering a full year are not available, the Allowances shall be based on records for the most comparable PHA housing in the area as to construction type and size of units, utility combinations, climatic conditions, and types of equipment. Utilities data for comparable projects shall be obtained from the records of PHAs, the Utility suppliers or the HUD Field Office. See also § 865.474(b) with respect to scattered site dwelling units.

(c) **Source of data for Tenant-Purchased Utilities.** In the case of Tenant-Purchased Utilities, the PHA must establish a special procedure for obtaining the consumption data for those dwelling units. The PHA shall utilize a method which it finds best taking into consideration practicability, reliability, and administrative cost. Such methods may include, for example, arrangements with Utility suppliers to furnish consumption data to the PHA (without identification of the users, if the Suppliers so prefer); meter readings by the PHA; having the tenants furnish copies of their utility bills (or making them available for copying) in connection with the payments of their monthly rents.

24 C.F.R. § 865.477 Standards for allowances for PHA-furnished utilities. (1983)

The Allowances for PHA-Furnished Utilities for each dwelling unit category and unit size shall be established in terms of consumption units, sufficient to meet the requirements of about 90% of the dwelling units in the category. Conversely, the Allowances should be such as are likely to result in surcharges

for about 10% of the dwelling units. The basic method of determining the Allowances should be as follows:

(a) The dwelling unit consumption data for all units within each dwelling unit category and unit size should be listed in order from low to high consumption for each billing period.

(b) The PHA should determine whether there are any unusually high instances of consumption which might be due to unusual individual circumstances, wasteful practices, or use of the Utility for tenant-supplied major appliances. The PHA should exclude such cases from consideration in calculating the amount of the allowance.

(c) Where the available data covers two or more years, averages should be computed and adjustments made, if warranted, by reason of abnormal weather conditions or other changes in circumstances affecting utility consumption.

(d) The Allowances should then be established at the level which can reasonably be expected to meet the requirements of 90% of the dwelling units in the category.

24 C.F.R. § 865.478 Standards for allowances for tenant-purchased utilities. (1983)

In the case of Tenant-Purchased Utilities, the Allowance is provided in terms of a fixed number of dollars made available to each tenant in the dwelling unit category for purposes of paying his or her Utility bills. If a tenant's Utility expense is less than the Allowance, the tenant retains the benefit, while if a tenant's Utility expense is more than the Allowance, the tenant must absorb the excess cost. In these circumstances, in order for the total Utility expense to the PHA for the particular dwelling unit category to be equal to the total of the Utility bills for all the dwelling units in that category, the amount of the Allowance for each dwelling unit must be established at the average amount per dwelling unit. Accordingly, the basic method of determining the Allowance should be as follows:

(a) Proceed as stated in paragraphs (a) through (c) of § 865.477.

(b) Determine the total amount of consumption for each month for all the dwelling units in the category, and divide by the number of dwelling units, in order to obtain the average amount of consumption per dwelling unit for that month.

(c) Apply the current rate structure of the Utility supplier to each month's average amount of consumption in order to compute the dollar cost of each month's average amount of consumption. The result will be the monthly Allowances for Tenant-Purchased Utilities for the particular Utility and dwelling unit category involved.

24 C.F.R. § 865.479 Surcharges for excess consumption of PHA-furnished utilities. (1983)

PHAs shall include in their rent schedules for dwelling units subject to Allowances for PHA-Furnished Utilities, schedules of Surcharges indicating the additional dollar amounts tenants will be required to pay for Utility consumption in excess of the Allowances. These Surcharge Schedules may show the amounts of Surcharge for specific blocks of excess consumption rather than amounts computed on a straight per-utility-unit basis. The amount of the Surcharge for each block shall be computed by applying the Utility Supplier's average rate to the amount of excess consumption.

24 C.F.R. § 865.480 Review and revision of allowances. (1982) (revised 47 Fed. Reg. 19124, May 4, 1982)

(a) **Revision by Reason of Inadequate Data Base (for PHA-Furnished Utilities).** Where the data base for establishment of the Allowance consisted of less than three years for the particular housing, the PHA shall review the Allowances at the end of each year, taking into consideration the data for the particular housing, until an Allowance based on records for three years for the particular housing has been established.

(b) **Allowance for PHA-Furnished Utilities.** (1) At the end of each quarterly or other billing period, in connection with the determination of surcharges, the PHA shall determine the number and percentage of tenants who are subject to sur-

charge. When the PHA finds that the percentage of surcharge cases is more than 25 percent of a category and there is no reason of a non-recurring nature (such as weather extremes) to account for this, the PHA shall review the consumption data and if appropriate, establish a revised Allowance in accordance with § 865.477.

(2) No separate revisions in the allowance by reason of changes in Utility rates are necessary because the PHA is billed directly by the Utility suppliers at their current rates and, by the same token, the PHA uses current rates in computing surcharges.

(c) **Allowances for Tenant-Purchased Utilities.** (1) Since the tenants in these cases are billed directly by the Utility suppliers at their current rates, the PHA shall monitor the rates on a monthly basis. Whenever there is a rate change which, by itself or together with prior rate changes not adjusted for, results in a change of 10 percent or more, the PHA shall revise the Allowance accordingly.

(2) The average consumption levels on which the Allowances are based shall be reviewed and revised in accordance with § 865.478 in the event of any change in circumstances indicating probability of a significant change in average consumption levels, but in any event once every three years.

(d) **Effective Date of Revised Allowances.** In order to allow a reasonable time for PHA determination and processing of a revision in Allowances, a revised Allowance shall take effect with the next billing period following compliance with requirements of notice to tenants prescrib [sic] under 24 CFR Part 861.

24 C.F.R. § 865.481 Individual relief. (1983)

(a) Requests for relief from surcharges for excess consumption of PHA-Furnished Utilities or from Utility supplier billings in excess of the Allowances for Tenant-Purchased Utilities may be submitted to the PHA on the following grounds:

(1) The consumption for the billing period is so far out of line with previous billing periods (seasonally adjusted) as to indicate a possible defect in the meter or error in the meter reading.

(2) A defect in the dwelling unit of PHA-Furnished equipment is causing a substantial and abnormal increase in Utility consumption. The term "defect" means a condition which the PHA has a duty to repair, such as windows or doors which do not close in accordance with their original design, broken windows, damaged walls, etc. The term "defect" does not include a deficiency in the original design, such as inadequate insulation by current standards, absence of storm windows, etc.

(3) In the case of Tenant-Purchased Utilities only, that the utility consumption exceeds the applicable Allowance by 20 percent or more for reasons other than wasteful or unauthorized usage.

(b) Requests for relief on the grounds authorized by this section shall be investigated by the PHA, which shall conduct or cause to be conducted, an energy audit of the unit to determine whether excess utility consumption is reasonable, given the characteristics of the specific dwelling unit, and appropriate relief shall be granted in accordance with the findings of the PHA.

(c) Where the PHA finds that excess utility consumption is due to wasteful or unauthorized usage, the PHA shall advise and assist the tenant on methods of reducing the utilities usage. This advice and assistance may include counseling, installation of new energy conserving equipment or appliances and corrective maintenance.

24 C.F.R. § 865.482 Establishment of allowances under §§ 865.470 through 865.481. (1983)

It is recognized that a reasonable time must be allowed for PHAs to assemble the records and data and establish allowances in accordance with the standards and procedures

set forth in §§ 865.470 through 865.481, after providing an opportunity for tenant comment as required by § 866.5 of this chapter. Accordingly, PHAs shall proceed to accomplish these results as promptly as possible, but shall establish such allowances effecive as of a date no later than 120 days from the effective date of this rule or extended date, if approved by HUD.

No. 85-5915

In The

Supreme Court of the United States

October Term, 1985

BRENDA E. WRIGHT, GERALDINE H. BROUGHMAN, and SYLVIA P. CARTER, individually and on behalf of all persons similarly situated,

Petitioners,

v.

CITY OF ROANOKE REDEVELOPMENT AND HOUSING AUTHORITY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

1. Does the phrase "and laws" as used in 42 U.S.C. § 1983 provide public housing tenants a federal cause of action to challenge their local landlord's implementation of complex interim utility regulations promulgated by the U. S. Department of Housing and Urban Development?
2. Do federal courts have jurisdiction of a lease dispute between public housing tenants and their local housing authority?
3. Are damage awards an appropriate remedy in private tenant suits seeking remedies for technical violations of utility subsidy regulations which are a part of a federal grant program allocating limited federal resources to the development of adequate low income housing?

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BRIEF FOR THE RESPONDENT

STATEMENT OF THE CASE

Petitioners are class representatives of approximately 1,100 tenants of public low-cost housing projects located in the City of Roanoke, Virginia. Respondent, the City of Roanoke Redevelopment and Housing Authority ("RRHA"), is a local public housing authority ("PHA") that manages and operates lower-income housing projects

pursuant to an Annual Contributions Contract ("ACC") with the Department of Housing and Urban Development ("HUD"). The ACC is mandated by the United States Housing Act of 1937, 42 U.S.C. §§ 1437-1437j (1985) ("the Act"), and requires PHAs receiving federal funds to abide by the Act and regulatory requirements established by HUD. ACC §§ 5, 7 (in record (R.) at Docket No. 30).

The Housing Act announces the policy of Congress to assist the states in remedying unsafe and unsanitary housing conditions and to alleviate the acute shortage of decent, safe, and sanitary dwellings for low-income families. 42 U.S.C. § 1437 (1985). To encourage and assist the states, the Act creates a federal subsidy program under which government funds are provided to states for the development and operation of public housing projects. 42 U.S.C. § 1437c (1985).

PHAs derive funds to operate their low-income projects from three sources: (1) rent collected from tenants, (2) fees collected from tenants for services other than rent, and (3) the federal subsidy. The rent a PHA may charge its low-income tenants is currently limited to 30% of the family's monthly adjusted income.[1] 42 U.S.C. § 1437a (1985).

In addition to rental charges, PHAs collect funds directly from tenants for damage costs and loss of items furnished by the PHA, management costs arising at termination of the lease (*e.g.*, cleaning stove, refrigerator, floors, removing trash), and maintenance costs incurred by the PHA because of the tenants' failure to maintain their yards, shovel snow, or provide proper trash containers for their individual units. *See* 24 C.F.R. § 966.4(b) (2) (1985) (incorporated in RRHA Lease, ¶ 8 (R. 5, exh. H)). In the same fashion, PHAs collect from tenants the cost of excess use of utilities, *i.e.*, usage over the amount allowed and provided to the tenants at no cost. 24 C.F.R. §§ 965.477, 966.4(b) (2) (1985).

[1]At the operative date of this suit, the Housing Act required that rent charged by PHAs "shall not exceed 25 percentum of family income in the case of a very low income family." 42 U.S.C. § 1437a(1) (1980). (Petitioners' SA 1-2.) The percentage ceiling for families of lower income was increased to 30% effective October 1, 1981. 42 U.S.C. § 1437a(a) (1985).

HUD annual contributions subsidize PHAs for needed operating and other expenses that they are unable to collect from tenants as rent or as other HUD-allowed cost recovery. 42 U.S.C. § 1437c(a) (1985). *See also* ACC §§ 7, 407 (R. 30). Recovery of excess utility cost is at issue in this case.

As a part of its overall subsidy scheme, HUD has, from time to time, issued regulations governing the establishment of utility allowances, *e.g.*, 24 C.F.R. §§ 865.470-.482 (1980), which provide free electricity or other utilities to tenants of PHAs. PHAs are required by HUD regulations to provide a reasonable amount of utilities to their tenants and are permitted by those same regulations to surcharge tenants for utility consumption above the allowed amounts. *See, e.g.*, 24 C.F.R. §§ 865.470, 865.473 (1980), superceded by 24 C.F.R. §§ 965.470, 965.473 (1985).

Interim utility regulations issued by HUD in 1980, 24 C.F.R. §§ 865.470-.482 (1980), are the source of this case.[2] The general scheme of these regulations provides

[2]Unless otherwise noted, all citations made hereinafter to the HUD utility regulations are to the interim regulations at 24 C.F.R. §§ 865.470-.482 (1980), which are at issue in this suit.

that a PHA should calculate its allowance of a "reasonable amount of electricity" as follows:

(1) The consumption data for all units of a dwelling unit category is listed in order from low to high consumption for each billing period. 24 C.F.R. § 865.477(a) (1980).

(2) Unusually high instances of consumption which may be due to unusual individual circumstances, wasteful practices, or use of tenant-supplied major appliances should be excluded from consideration in calculating the amount of the allowance. 24 C.F.R. § 865.477(b) (1980).

(3) Averages should then be computed from the data and adjustments made for abnormal weather conditions "or other changes in circumstances affecting utility consumption." 24 C.F.R. § 865.477(c) (1980).

(4) The utility allowances "should . . . be established at the level which can reasonably be expected to meet the requirements of 90% of the dwelling units in the category." 24 C.F.R. § 865.477(d) (1980).

Surcharges for consumption in excess of the allowances are to be imposed on "about 10%" of dwelling units. 24 C.F.R. § 865.477 (1980). *See also* 24 C.F.R. § 865.479 (1980). Surcharge of more than 10% of dwelling units, however, is also contemplated under the regulations. The regulations provide that at the end of each billing period, PHAs must review the number and percentage of tenants who are surcharged. If "more than 25%" of dwelling units in a category are surcharged, the regulations require the PHA to revise its allowances "if appropriate." 24 C.F.R. § 865.480(b) (1980).

Calculation of future utility allowances pursuant to the interim rule was in large part based on past tenant consumption. 24 C.F.R. § 865.476 (1980). The past consumption standard provided tenants no incentive toward energy conservation. The more utilities tenants consumed, the higher their future utility allowances. *See* 47 Fed. Reg. 35249, 35250-51 (1982). Within months of their implementation, the interim regulations were targeted for review by the Presidential Task Force on Regulatory Relief, which concluded that the interim regulations encouraged waste by tenants, increased costs to the government and PHAs and penalized tenants who tried to conserve energy. Exec. Order No. 12291 (1981), *cited in* 47 Fed. Reg. at 35250 (1982).

On December 8, 1982, petitioners filed a class action suit for injunctive relief and damages in the United States District Court for the Western District of Virginia against RRHA, contending that petitioners' PHA-provided allowances for free electricity (and surcharges for excess usage) were not being furnished in accordance with the Housing Act and interim HUD regulations. (J.A. 3). Petitioners sought recovery of all surcharges collected for excess electricity use and an injunction requiring RRHA to recalculate the electrical allowances. (J.A. 10). Petitioners' action was based on 42 U.S.C. § 1983, seeking redress for deprivation of "rights, privileges or immunities secured by the Constitution and laws" claimed to arise from RRHA's alleged failure to properly or fully implement the applicable HUD interim regulations governing the establishment of electrical utility allowances. (J.A. 9).[3]

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[3]Petitioners' claim under § 1983 is based solely on the "and laws" language of § 1983. It is well-established that tenants have no right to adequate housing arising under the Constitution. *Lindsey v. Normet*, 405 U.S. 56, 74 (1972). Petitioners do *not* allege any violation of their due process or equal protection rights under the 5th and 14th Amendments.

Petitioners did not sue HUD. RRHA filed a motion for judgment on the pleadings on the grounds that petitioners failed to state a cause of action under the Housing Act and 42 U.S.C. § 1983 and failed to join HUD as a necessary party.[4] (J.A. 16-17). RRHA answered petitioners' interrogatories (R. 5) and filed the ACC by affidavit. (R. 30). Petitioners filed a motion for summary judgment to be simultaneously considered with RRHA's motion. (J.A. 18).

On December 21, 1984, the district court, treating RRHA's motion for judgment on the pleadings as one for summary judgment, dismissed petitioners' case, concluding that petitioners have no right of action under 42 U.S.C. § 1983.[5] (J.A. 19-29). The district court did not reach the question of whether HUD is a necessary party to the suit. Petitioners appealed the district court's decision to the United States Court of Appeals for the Fourth Circuit, challenging the district court's holding that petitioners have no § 1983 remedy.[6] (R. 32).

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[4]Indeed, despite RRHA's assertion that HUD is an indispensable party in this suit (J.A. 16-17) and petitioners' repeated allegation that HUD has failed to effectively enforce its contract with RRHA (Brief of Petitioners, p. 39), petitioners have consistently refused to join HUD as a party to this suit.

[5]The district court also found that petitioners have no implied right of action under the Housing Act. (J.A. 3). Petitioners do not contend that such implied right of action exists and thus do not challenge this aspect of the district court's decision. (Brief of Petitioners, p. 8.)

[6]Petitioners also asserted a right of action grounded in RRHA's alleged violation of the standard lease agreement between tenants and RRHA, which the circuit and district courts properly dismissed as a pendent claim pursuant to *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966). Such lease creates a landlord-tenant relationship governed by state law. *See infra* pp. 38-42.

Peitioners' claim for injunctive relief was mooted by HUD's adoption of a final rule in 1984 and RRHA's revision, effective January 1985, of its utility allowances pursuant to the new utility regulations. Petitioners' Statement of Proceedings (R. 33). Accordingly, petitioners' sole claim in this case is one for damages measured by the amount of the surcharges they contend were improperly collected for electrical consumption in excess of the free electricity provided by allowance in the years 1981-1984. (Brief of Petitioners, p. 8.)

The circuit court, applying the tests set out in *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981), and *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981), concluded that no § 1983 action was available to petitioners and that HUD alone is the appropriate party to enforce the provisions of the Act and agency utility regulations against the local PHA. (J.A. 30-44).

RRHA's compliance with the regulations, the amount of electricity provided, and the propriety of any surcharges are not at issue in this appeal. The principal issue before this Court is whether the phrase "and laws" as used in 42 U.S.C. § 1983 allows petitioners a federal forum in which to challenge the implementation and application of these HUD utility regulations by a local PHA. A secondary issue is whether the tenant lease creates a basis for federal question jurisdiction.

SUMMARY OF ARGUMENT

The United States Housing Act of 1937 and the federal funding scheme created pursuant thereto by Congress establish the basic framework of the national housing program. The Department of Housing and Urban Development is delegated regulatory authority under this scheme. Among its many regulations, HUD has promulgated utility allowance regulations requiring public housing authorities to provide reasonable amounts of free utilities to their low-income tenants. Neither the HUD regulatory scheme nor the Housing Act vests in public housing tenants substantive rights to free utilities sufficient to trigger a cause of action under 42 U.S.C. § 1983.

The Brooke Amendment, 42 U.S.C. § 1437a(a) (1985), limits the amount of rent a PHA may charge its public housing tenants. Congress did not include utilities as a component of the rent limitation set out in the Brooke Amendment. In other unrelated portions of the Housing Act, however, Congress did include the cost of utilities in the definition of "rent." *See* 42 U.S.C. § 1437f (1985). Common rules of statutory construction and the plain meaning of the Brooke Amendment establish that Congress imposed no specific limitation on the amount of electricity a PHA could or should provide its tenants and likewise imposed no specific limitation on the amount of electricity public housing tenants could use at their own expense. Petitioners' claimed right to free electricity thus does not arise under federal statutory "law" within the meaning of 42 U.S.C. § 1983.

The utility allowance scheme on which petitioners rely, 24 C.F.R. §§ 865.470-.482 (1980), is purely a regulatory

creation of HUD. Section 1983 heretofore has been recognized only as a remedy for state violations of federal statutory rights, not violations of regulatory rights. *Maine v. Thiboutot*, 448 U.S. 1 (1980).

In *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981), this Court established that where the statutory "rights" of which enforcement is sought under § 1983 are nonspecific, a § 1983 cause of action is not available. The regulatory scheme at issue in this case does not create in petitioners any right to free electricity sufficiently specific to be enforced under § 1983. HUD's interim utility allowance regulations establish guidelines that PHAs must follow in calculating "reasonable" utility allowances. 24 C.F.R. §§ 865.470-.482 (1980), superceded by 24 C.F.R. §§ 965.470-.480 (1985). PHA utility calculations under the interim regulations require highly technical computations and the broad use of PHA discretion in balancing an almost endless array of subjective criteria. Such broad discretion is vital to the fair allocation of utility allowances.

HUD retains discretion in administering and enforcing the utility program. This discretion is particularly critical in the instant case, given HUD's awareness of the serious deficiencies and ambiguities inherent in the interim regulations.

Calculation of PHA utility schedules and imposition of individual utility surcharges by federal courts in § 1983 tenant actions would severely undermine HUD's administrative and enforcement authority. Carefully defined policy goals and resource allocations would be disrupted by such judicial intrusion into the regulatory process.

In *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981), this Court established that no § 1983 cause of action is available where the framework of the statute in question evinces Congress' intent to preclude a § 1983 remedy. A review of congressional purpose in implementing the federal funding framework of which the HUD utility regulations are a part, discloses congressional intent to foreclose private § 1983 enforcement of the interim regulations.

HUD retains broad discretion in enforcing PHA compliance with its regulations under the elaborate HUD subsidy scheme. HUD establishes the guidelines under which PHAs must calculate their utility allowances, periodically audits PHA calculations, and retains the power to approve the PHA allowances prior to their implementation. HUD also maintains financial control over PHAs through the funding provisions of the ACC.

In determining whether Congress intended to foreclose a § 1983 action under a federal grant program created by legislation that predates this Court's decision in *Thiboutot*, the factors set out in *Cort v. Ash*, 422 U.S. 66 (1975), logically must be considered in defining congressional purpose. The need to look beyond the express congressional articulation of intent is particularly vital where, as here, petitioners' alleged rights are grounded in agency regulations. The local nature of petitioners' state landlord-tenant claim, the congressional goal of encouraging state involvement in the federal housing program, and the Housing Act's express purpose "to assist the States" are evidence that Congress intended to preclude a § 1983 remedy under the public housing subsidy program.

RRHA has met the requirements of the tests enunciated by this Court in *Pennhurst* and *Sea Clammers* to es-

tablish that petitioners have no § 1983 action in this case. Even if this Court believes that petitioners are possessed of a § 1983 claim, the sole remedy that petitioners seek, compensatory damages, is inappropriate in a private action to redress violations of a federal grant program like that created by the Housing Act and HUD regulations. *See Guardians Ass'n v. Civil Service Comm'n*, 463 U.S. 582 (1983) (White, J., plurality).

Finally, petitioners' lease with RRHA creates a local landlord-tenant relationship, the dynamics of which necessarily and properly are governed by state law. The mere fact that the terms of RRHA's standard lease are defined by HUD regulation does not elevate petitioners' state lease claim to a federal question. To hold otherwise would make every broken window or plumbing failure grounds for a federal cause of action. The district and circuit courts below properly dismissed this pendent state claim in the reasonable exercise of their discretion. *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966).

ARGUMENT

I. Public Housing Tenants Have No Federal Cause Of Action Under 42 U.S.C. § 1983 To Redress Individual Grievances Arising Out Of Their Local Landlord's Implementation Of Technical Interim Utility Regulations Promulgated By The Department Of Housing And Urban Development.

The trilogy of *Maine v. Thiboutot*, 448 U.S. 1 (1980), *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981), and *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981), provides the framework for resolution of this case. In *Maine v. Thiboutot*, 448 U.S. 1 (1980), this Court concluded that

the plain meaning of the phrase "and laws" in 42 U.S.C. § 1983 creates a private cause of action to redress not only state violations of civil rights and equal protection statutes, but also state violations of all federal statutes.[7] 448 U.S. at 4. This Court's subsequent decisions, however, recognize that unlimited judicial applications of the "and laws" language of § 1983 is impractical and inappropriate. An unqualified interpretation of *Thiboutot* not only would place an impossible burden on state officials attempting to comply with the myriad of federal directives, but also would seriously undermine agency authority to promulgate regulations and enforce policy objectives.

This Court swiftly noted exceptions to *Thiboutot* in *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981), and *Middlesex County Sewerage Authority*

[7]In *Thiboutot*, the Court concluded that § 1983 embraced respondents' claim that the state had violated the Federal Social Security Act. The Court's holding extended the § 1983 remedy to "violations of federal *statutory* law as well as constitutional law" by state actors. 448 U.S. at 4. *Thiboutot* does not suggest the extension of § 1983 to federal regulatory enactments. Indeed, the oft-expressed "rule" relied upon by petitioners that a properly promulgated final rule may have "the *force* and *effect* of law," *see Chrysler Corp. v. Brown*, 441 U.S. 281, 301-303 (1979), is a tacit admission that agency regulations are not themselves laws in the statutory sense. (Brief of Petitioners, p. 26.)

This Court has noted on numerous occasions that the framers of § 1983 intended that statute to provide a federal cause of action to prevent state actors from violating federal *statutory* rights where the states were unwilling or unable to take action to remedy the violations. *District of Columbia v. Carter*, 409 U.S. 418, 426-29 (1973); *Monroe v. Pape*, 365 U.S. 167, 174-83 (1961), *rev'd on other grounds, Monell v. Dept. of Social Services*, 436 U.S. 658 (1978). Clearly, however, such concerns are not present in the context of modern federal grant programs, where the grantor agency is itself a federal entity, one of the primary functions of which is to oversee the operation of the local grantee. Brown, *Whither Thiboutot? Section 1983, Private Enforcement, and the Damages Dilemma*, 33 DEPAUL L. REV. 31, 64 (1983).

v. National Sea Clammers Ass'n, 453 U.S. 1 (1981).[8] These two decisions make clear that claimants cannot bring suit in federal court every time there is an alleged violation of federal law by a state actor. A § 1983 remedy is unavailable where it is shown (1) that the "law" allegedly violated fails to create substantive rights sufficient to trigger a § 1983 action, *Pennhurst*, 451 U.S. at 28, *or* (2) where Congress intended to preclude a § 1983 remedy by expressly or impliedly foreclosing private enforcement of the statute. *Sea Clammers*, 453 U.S. at 19-20.

A. Public Housing Tenants Do Not Have Rights To Specific Amounts Of Free Electricity Under HUD Utility Regulations Sufficient To Trigger A Cause Of Action Under 42 U.S.C. § 1983.

In *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981), this Court established that a cause of action under 42 U.S.C. § 1983 is unavailable where a claimant attempts to enforce nonspecific or ambiguous "rights." 451 U.S. at 18. Under HUD's interim utility regulations, petitioners are not entitled to specific amounts of free utilities. Rather, PHAs are to provide "reasonable" amounts of utilities to tenants. Thus, petitioners have no "rights" sufficient to satisfy the *Pennhurst* test. PHAs must balance ambiguous criteria and exercise broad discretion in calculating tenant utility allowances under the interim regulations. HUD's concommitant exercise of discretion in enforcing the regulations is critical to the equitable and efficient operation of the utility subsidy system.

This Court in *Pennhurst* found that disabled citizens have no enforceable § 1983 rights to "appropriate treat-

[8]This Court has most recently restricted the broad reach of 42 U.S.C. § 1983 in another context in *Daniels v. Williams*, — U.S. —, 106 S. Ct. 662 (1986) (mere negligence of state official will not support constitutional claim for relief under § 1983).

ment" in the "least restrictive environment" under 42 U.S.C. § 6010, the Developmentally Disabled Assistance and Bill of Rights Act.[9] 451 U.S. at 18. In reaching its conclusion, the Court recognized that meaningful state participation in consensual social welfare projects would be inhibited if beneficiaries of typical federal grant programs were vested with enforceable rights under those programs. 451 U.S. at 18, 24-25.

Imposing potential § 1983 liability on PHAs that fail to provide "reasonable utilities" to public housing tenants would have the same negative consequences on the public housing program as awarding "appropriate treatment" to disabled citizens would have had on the federal funding program at issue in *Pennhurst*. The utility subsidy program is a consensual federal-state grant program, the effective administration of which depends on HUD's broad exercise of discretion. Under the interim regulations, HUD provides federal assistance to PHAs that agree to provide low-income tenants with "reasonable" amounts of free utilities. 24 C.F.R. §§ 865.470-.482 (1980). In administering the program, HUD retains the discretion not only to establish and revise the guidelines under which the utility allowances are to be calculated, but also the responsibility to audit, evaluate and determine whether PHA-calculated utility allowances are in compliance with HUD

[9] 42 U.S.C. § 6010 (1976) in pertinent part provides:

> Congress makes the following findings respecting the rights of persons with developmental disabilities:
>
> (1) Persons with developmental disabilities have a right to appropriate treatment, services, and habilitation for such disabilities.
>
> (2) The treatment, services, and habilitation for developmental disabilities . . . should be provided in the setting that is least restrictive of the person's personal liberty. . . .

directives. *See* 24 C.F.R. § 865.473(a) (1980). *See also* ACC §§ 311 (audits), 507-508 (governmental remedies in event of breach) (R. 30). HUD also exercises its discretion in approving PHA allowances before they become effective. 24 C.F.R. § 865.473(a) (1980).

HUD's policymaking and enforcement authority would be severely undermined if the regulatory process could be circumvented by individual tenants claiming § 1983 rights against local PHAs under utility subsidy regulations. HUD's administrative efforts and adjustments would be subject to constant interruption and challenge as the courts interpreted and enforced regulations and guidelines in the agency's area of expertise and responsibility. Judicial damage awards under § 1983 would result in a reallocation of limited HUD funds and would disrupt the delicate financial priorities established by HUD pursuant to its program goals. The formulation of a coherent national housing policy would be rendered almost impossible as courts could, and most probably would, vary on such fundamental regulatory issues as what are "abnormal weather conditions," what are "wasteful" tenant activities, and what are "major" or "unusual" tenant-owned appliances. *See* 24 C.F.R. § 865.477 (1980).

Efforts to define the inexact standard of "reasonable utilities" are the essence of the utility regulations upon which this suit is based. HUD has defined the "contract rent" to be paid by public housing tenants to include "rent" plus "reasonable amounts of utilities." *E.g.*, 24 C.F.R. § 860.403(a)(1982). Petitioners portray this standard as a mere mechanical calculation that federal courts can utilize to redress claims for specific sums of free utilities. (Brief of Petitioners, pp. 25-26.) A realistic ap-

praisal of the regulations, however, leaves little doubt that calculation of utility allowances cannot be reduced to a mechanical formula. Rather, such computations under the interim utility regulations require significant PHA discretion and HUD supervision. 24 C.F.R. § 865.477(b) (1980) provides that a PHA should not consider "any unusually high instances of consumption which might be due to unusual individual circumstances, wasteful practices, or use of . . . tenant-supplied major appliances" in calculating allowances.[10] A federal court imposing *specific* utility allowances on a PHA under the regulations would thus be forced to exercise discretion as to which excess consumption elements should be excluded from the calculation and impose its own policy judgment as to which utility uses constitute "wasteful" or "excessive" practices.

Even greater discretion is necessary in the imposition of tenant surcharges. The utility regulations provide that PHAs should calculate utility allowances "at the level which can reasonably be expected to meet the requirements of 90% of the dwelling units in the category." 24 C.F.R. § 865.477(d)(1980). Surcharges for excess consumption are to be imposed on "about 10%" of dwelling units. 24 C.F.R. § 865.477 (1980). A close examination of the regu-

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[10]Because of the stop-gap nature of the interim regulations in this case, the regulations provided little guidance concerning the distinction between tenant use of "major appliances" or "luxury items" (as defined at 49 Fed. Reg. 31399, 31404 (1984)) and "reasonable" utility uses. In formulating the final rule, however, HUD discussed in detail the difficult discretionary decisions involved in balancing consumption factors in calculating utility allowances:

> Should indoor temperature levels be set at 68° F. or 70° F.? Should air-conditioning be included? Should elderly households be treated differently than non-elderly? Should washers and dryers be included? HUD believes these decisions are within the competence of PHAs to establish.

49 Fed. Reg. at 31404.

lations, however, makes clear that surcharge of more than 10% of dwelling units is contemplated by HUD. Under 24 C.F.R. § 865.480(b)(1980), a PHA is not required to revise its allowances until "*more than 25%*" of the tenants in a dwelling unit category are being surcharged. Even at the 25% mark, such revision is required only "if appropriate." 24 C.F.R. § 865.480(b) (1980).

As the foregoing makes clear, the utility regulations do not provide tenants with § 1983 rights to specific sums of free utilities. "Reasonable utilities" is not susceptible to objective mechanical calculation under the regulatory framework. HUD and PHA discretion is critical in balancing a long list of imprecise criteria which may affect calculation of allowances and assessment of surcharges in any billing period. Moreover, there are fundamental ambiguities in the calculation formula itself—ambiguities properly left to an administrative agency with national oversight of a national program.

If petitioners in this case are vested with § 1983 rights, federal courts will be required to undertake technical and highly discretionary reviews of individual tenant energy consumption, comparing individual use with uses of other tenants in similar dwellings and taking into account weather conditions, unit size and past consumption history, in order to determine which tenants were properly surcharged and the amount of the actual surcharge. Review of the case at bar would necessitate examination of the personal consumption habits of 1,100 households. (J.A. 5). Given these considerations, it is "highly unlikely that Congress intended federal courts to make the necessary computations regarding utility allowances that would be required to adjudicate individual claims of right." *Wright v. City of Roanoke Redevelopment and Housing Authority*, 771 F.2d

833, 836-37 (4th Cir. 1985). *See also Brown v. Housing Authority of McRae,* No. 85-8186 (11th Cir. Mar. 25, 1986) (*case lodged with the Clerk for the convenience of the Court).[11]

[11]Petitioners suggest that the weight of authority supports the proposition that public housing tenants have § 1983 rights to specific utility allowances. (Brief of Petitioners, p. 15 n.12.) However, all of the utility allowance cases on which petitioners rely for the proposition that § 1983 rights attach to HUD's interim utility allowance regulations have their genesis in the district courts of the Fourth and Eleventh Circuits. The rationale behind these decisions was rejected in *Wright v. City of Roanoke Redevelopment and Housing Authority,* 771 F.2d 833 (4th Cir. 1985) (J.A. 30), and *Brown v. Housing Authority of McRae,* No. 85-8186 (11th Cir. Mar. 25, 1986) (*lodged with the Clerk). In *Stone v. District of Columbia,* 572 F. Supp. 976 (D.D.C. 1983), the district court also held that no § 1983 rights accrued to tenants under the interim utility regulations. The district court's decision was appealed by tenants, and the suit was settled by subsequent HUD action prior to a circuit court decision. On April 2, 1986, HUD filed a motion for affirmance of the district court decision.

A holding that § 1983 rights do not attach to tenants under HUD's interim utility regulations does not mean that tenants have no substantive rights under other sections of the Housing Act. As this Court made clear in *Pennhurst,* 451 U.S. at 23, certain sections of an act or program may give rise to rights while other sections do not. Thus petitioners' reliance upon cases involving violations of clear congressional mandates under the Housing Act, as opposed to the discretionary and ambiguous interim utility regulations involved here, is inappropriate. *See generally Samuels v. District of Columbia,* 770 F.2d 184, 198-99 n.12 (D.C. Cir. 1985) (distinguishing nondiscretionary congressional mandate to implement grievance mechanism, 42 U.S.C. § 1437d(k), with more vague congressional language in 42 U.S.C. § 1437 (policy statement) and 42 U.S.C. §§ 1437d(c)(4) and 1437d (c)(3)(ii) (tenant selection criteria)). *Compare Perry v. Housing Authority of the City of Charleston,* 664 F.2d 1210 (4th Cir. 1981) (no § 1983 rights created by policy language of 42 U.S.C. § 1437) and *Phelps v. Housing Authority of Woodruff,* 742 F.2d 816 (4th Cir. 1984) (no § 1983 rights to tenant selection process under 42 U.S.C. §§ 1437d(d)(ii), 1437d(c)(4)) with *Beckham v. New York City Housing Authority,* 755 F.2d 1074 (2d Cir. 1985) (section 1983 cause of action for violation of Brooke Amendment rent limits).

Judicial enforcement of individual tenant claims in this case is particularly inappropriate given the interim nature and controversial history of the utility regulations upon which petitioners rely.[12] Calculation of the utility allowances under the interim regulations is in large part based on past consumption records for each dwelling unit. 24 C.F.R. § 865.476(a) (1980). The inequality created by a mechanical application of the past consumption standard is evident: the more utilities a tenant consumes, the more free electricity the tenant would be entitled to receive in the future, and based on that increased consumption, the entitlement would be enlarged again (and again and again). *See* 47 Fed. Reg. 35249, 35251 (1982). Under this formula,

[12]HUD's utility allowance regulations historically have engendered significant comment from PHAs and tenant groups. 49 Fed. Reg. 31399, 31401 (1984). The original utility allowance rule proposed by HUD met with such fierce disapproval by both PHAs and tenants in the notice and comment process that HUD was forced to withdraw the plan. 45 Fed. Reg. 59502 (1980). In its place, HUD implemented 24 C.F.R. §§ 865.470-.482 (1980), the interim regulations upon which this suit is based. The interim rule became effective October 1, 1980, prior to notice and comment, although notice and comment is generally required for valid HUD rulemaking by 24 C.F.R. § 10.1 (1979). *See Brown v. Lynn,* 392 F. Supp. 559 (N.D. Ill. 1975) (rules promulgated in violation of 24 C.F.R. § 10.1 not binding).

As an acknowledgment that the interim rule was not finely-tuned and that revisions would be necessary, HUD requested comments from interested parties, but such comments were not due until after the effective date of the interim regulations. 45 Fed. Reg. 59502 (1980). HUD's explanation for instituting the program prior to notice and comment was the need to effectuate the plan before the onslaught of winter. 45 Fed. Reg. at 59505. However, PHAs were not required to comply with the interim rule until February 1981. 47 Fed. Reg. 35249, 35250 (1982). The comments received on the interim rule revealed serious defects in the plan, *see infra* pp. 20-21, verifying that the gap-filling regulations are inappropriate for literal interpretation. As HUD acknowledged, "provisions of the interim rule attracted even sharper criticism from PHAs than the proposed rule." 47 Fed. Reg. at 35251.

the greatest benefits accrue to abusers of the system. Tenants who routinely run air conditioners at all hours and frequently use "major tenant-supplied appliances" or "luxury" appliances (as defined at 49 Fed. Reg. 31404 (1984)) are entitled to more electricity than tenants who attempt to conserve energy.

HUD quickly became aware of the deficiencies inherent in the interim rule and shortly after its implementation proposed revisions. *See* 47 Fed. Reg. 35249 (1982). The Department's comments recognize not only that the interim regulations were wasteful, but also that they were inequitable to tenants who purchased their utility services directly from public utilities.[13] 49 Fed. Reg. at 35250-51. The utility consumption "allowed" to tenants who were provided utility services by the PHA was more generous than the amount "allowed" to tenants billed directly by the utility. Under the interim rule, allowances for tenant-purchased projects were established on the basis of the average actual cost of the utilities to the tenants. 24 C.F.R. § 865.478 (1980). Half of the tenants in tenant-purchased projects therefore were subject to surcharge for excess consumption. 49 Fed. Reg. at 31400. In projects in which the PHA provided services, like those in which petitioners reside, however, utility allowances were set at a level *above*

[13]The interim regulations established that utilities either may be "Tenant-Purchased" or "PHA-Furnished." In the case of Tenant-Purchased Utilities, the tenant pays the actual utility charge directly to the supplier, and the fixed Allowances are deducted from the Gross Rent otherwise chargeable to the tenant. PHA-Furnished Utilities are provided under a check-meter system whereby the PHA pays the utility supplier and surcharges tenants for consumption in their dwelling units in excess of the Allowance. *See* 24 C.F.R. § 865.470 (1980). Petitioners in this suit are residents of PHA-Furnished projects.

average consumption.[14] 24 C.F.R. § 865.477(d) (1980). *See generally* 49 Fed. Reg. at 31400.

The inadequacies of the interim regulations were swiftly noted in other quarters as well. On August 12, 1981, just months after its implementation, the interim rule was targeted for review by the Presidential Task Force on Regulatory Relief, chaired by Vice President Bush. Exec. Order No. 12291 (1981), *cited in* 47 Fed. Reg. at 35250. In its announcement, the Task Force stated:

> Under current rules, many tenants in public housing projects have no incentive to economize on utility use. Excessive utility use increases costs to both the Federal government and local public housing agencies (PHAs). As a result, PHAs may be forced to reduce other tenant services in order to cover costs. In effect, this system penalizes conservation-minded tenants and wastes energy.

47 Fed. Reg. at 35250.

The nonspecific nature of the utility allowances coupled with the interim regulations' peculiar history, make the regulations inappropriate for literal judicial enforcement. HUD exercises substantial discretion in approving, monitoring and enforcing PHA utility allowances. Such agency discretion was pivotal to the fair administration of the utility subsidy program under the interim rule, partic-

[14]The historic rationale for this difference in treatment was "to prevent surcharging too many tenants." 49 Fed. Reg. at 31400. HUD, however, quickly recognized that "the pragmatic objective of avoiding the surcharging of too many tenants by PHA's is outweighed by the inequality which results from requiring more generous allowances for tenants in PHA-furnished projects than allowances provided for direct-purchasing tenants." 47 Fed. Reg. at 35251. Indeed, the final regulations place no limit on the number of tenants that a PHA may surcharge for excess utility consumption. 24 C.F.R. §§ 965.476(a), 965.477(b) (1985).

ularly given HUD's awareness of the critical shortcomings of the regulations.

Broad agency discretion is vital to HUD's effective administration of the federal-state funding scheme of which the utility subsidy program is a part. Such discretion ensures HUD the flexibility to implement an ongoing review process and permits the agency to engage in a continuing dialogue with the states and tenants, issuing directives to them and listening to their comments and complaints with regard to the feasibility—or lack thereof—of department regulations. Communication between a promulgating agency and participants in developing programs is particularly important where, as in this case, agency efforts to fine-tune interim regulations are concerned. Where interim rules are at issue, there exists a danger that courts may enforce literally that which the agency intends to be part of the give-and-take of the rulemaking process. Petitioners should not be allowed to interpose their view as to the proper application of the interim regulations in lieu of the views of HUD and local PHAs.

B. The Housing Act Confers On Petitioners No Right To Specific Amounts Of Free Electricity Cognizable Under 42 U.S.C. § 1983

As established in *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981), a § 1983 cause of action is not available if the federal statute allegedly violated fails to create in the claimant substantive, unambiguous rights. 451 U.S. at 28. In *Pennhurst*, the Court concluded that the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. §§ 6000 *et seq.*, created a federal-state funding scheme "to assist [the] States in improving the care and treatment available to the mentally retarded," 451 U.S. at 22, and noted that the case for private enforcement of statutes is at its weakest where private rights would impose affirmative funding obligations on the states. 451 U.S. at 16-17.

The Housing Act, like the Developmentally Disabled Bill of Rights Act, creates a federal grant program under which the federal government provides funds to states which agree to adhere to federally-defined guidelines and policy goals. The Act expressly declares:

> It is the policy of the United States to promote the general welfare of the Nation by employing its funds and credit, as provided in this Act, *to assist the several States and their political subdivisions* to remedy the unsafe and unsanitary housing conditions and the acute shortage of decent, safe and sanitary dwellings for families of lower income. . . .

42 U.S.C. § 1437 (1985) (emphasis added). This broad declaration of policy establishes that the primary purpose of the Housing Act is to provide direct financial incentives to the states and their local agencies in order to increase and improve the housing stock available to lower-income families. Lower-income tenants incidentally benefit from the federal assistance provided the states. Such incidental benefits, however, are insufficient to create in public housing tenants a § 1983 action to enforce HUD utility regulations against local PHAs.

In order to claim their "right" to free electricity, petitioners rely on the language of the Brooke Amendment, 42 U.S.C. § 1437a(a) (1985). The Brooke Amendment establishes the income levels that public housing tenants must meet in order to qualify for public housing and the percentage of that income that may be charged as rent to these tenants. The Brooke Amendment rent limits, however, do not provide for, nor even mention, utilities as a

component of the rent charged tenants of public housing authorities. Review of the Housing Act establishes that where Congress intended utilities and/or other charges to be considered in the calculation of tenant "rent," it expressly said so. The absence of any reference to "utilities" in the Brooke Amendment limits establishes that Congress had no intention to offer tenants the same protection against charges for direct operating costs as it offered them for rent.

The Housing Act creates two types of public low-income housing arrangements that HUD may subsidize. As in this case, HUD may enter into an ACC with the local PHA under which federal monies are provided to the PHA to assist the housing authority in the development and maintenance of low-income housing. 42 U.S.C. § 1437c (1985). *See also* 42 U.S.C. § 1437d (1985). The statutory provisions creating this subsidy limit rent collections, but make no mention of utility costs or charges.

HUD also may enter into ACCs with PHAs under which PHAs make assistance payments to owners of private dwelling units who will rent so-called "Section 8 housing" to low-income families. 42 U.S.C. § 1437f (1985). Unlike the PHA-assisted programs at issue in this case, Congress expressly provided that Section 8 "rent" includes utilities: "An assistance contract entered into pursuant to [Section 8] shall establish the maximum monthly rent (*including utilities and all maintenance and management charges*) which the owner is entitled to receive. . . ." 42 U.S.C. § 1437f(c) (1) (1985) (emphasis added). Similarly, in defining the maximum monthly rent payable to the owner of real property on which is located the manufactured home of a low-income family, Congress expressly defined "rent" to include fees for maintenance and manage-

ment: "A contract entered into pursuant to this paragraph [of Section 8] shall establish the maximum monthly rent (*including maintenance and management charges*) which the owner is entitled to receive. . . ." 42 U.S.C. § 1437f(j) (2) (A) (1985) (emphasis added).

Unlike the Section 8 provisions discussed above, the Brooke Amendment does not define "rent" beyond its plain meaning (*i.e.*, shelter cost or a fee for a possessory use of the land).[15] Under the principle of *inclusio unius est exclusio alterius*, Congress' express inclusion of utilities as "rent" in Section 8 of the Housing Act necessarily implies Congress' intent to exclude utilities from "rent" in those sections of the Act in which utilities are not so expressly included.

Nevertheless, petitioners assert that § 2 of the original Housing Act of 1937, ch. 896, § 2, 50 Stat. 888 (1937) (S.A. 5-6), is evidence that Congress intended the Brooke Amendment to limit utilities as well as rent. (Brief of Petitioners. pp. 23-24.) That now-amended provision, however, specifically included utilities in the concept of "rental" only for the limited purpose of calculating tenant income eligibility requirements, not for the purpose of determining the amount of rent PHAs could charge their low-income tenants. The original § 2 provided that in calculating a potential tenant's qualification for low-income housing "the value *or cost*" to the tenant of utilities must be considered *in addition to* the "rent" the tenant would be expected to pay. The plain language of § 2 contemplated that, after eligibility is established, utilities

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[15] BLACK'S LAW DICTIONARY 1166 (rev. 5th ed. 1979), defines "rent" simply as "[c]onsideration paid for use or occupation of property." Common usage thus does not recognize utilities as an inherent part of "rent."

could be a "cost" incurred by PHA tenants. In any event, Congress amended § 2 in 1959, expressly deleting the reference to "utilities" in the income eligibility requirement and in its place providing a more general reference to "other factors which might affect the rent-paying ability of the family. . . ." Housing Act of 1959, Pub. L. No. 86-372, § 503, 73 Stat. 654 (1959) (S.A. 6) (current version at 42 U.S.C. § 1437 (1985)).

Congress had a clear opportunity to incorporate a provision expressly including utilities in the rental limitation set out in the Brooke Amendment (as it did in Section 8 housing), but chose not to do so. The original Senate bill introducing the rent limitation (later to be known as "the Brooke Amendment"), S. 2864, 91st Cong., 1st Sess., § 211 (1969), specifically proposed a definition of "rent" to include "any separate charges to a tenant for reasonable utility use and for public services and facilities." That specific definition, however, was deleted from the final Act by Congress, which instead provided only for "rents (which may not exceed one-fourth of the family's income, as defined by the Secretary)." Pub. L. No. 91-152, Title II, § 213(a), 83 Stat. 389 (1969) (S.A. 7). Given this history, the plain language of the Brooke Amendment must control: "rent" means shelter cost, and if any § 1983 right to limited rent is deemed to exist, there can be no corollary right to free utilities (*e.g.*, electricity) derived therefrom, absent express congressional definition to that effect.

Indeed, the legislative history and the Act itself belie petitioners' reliance on the statute. Canons of statutory interpretation require that the Brooke Amendment language be given its plain meaning and where Congress contemplated but did not adopt language supportive of peti-

tioners' view, petitioners' view must be rejected. Petitioners have failed to establish any § 1983 right to free electricity under the Brooke Amendment and HUD regulations.

C. The Comprehensive Enforcement Scheme Created By The Housing Act And HUD Subsidy Program Evinces Congress' Intent To Foreclose A § 1983 Action To Enforce HUD Utility Regulations.

In *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1, 19 (1981), this Court made clear that where Congress has manifested an intent to foreclose private enforcement of a statute, no § 1983 cause of action will be available. In *Sea Clammers*, respondents brought suit in federal court against state and local authorities alleging damage to fishing grounds caused by discharge of sewerage and other pollutants into the Hudson River and New York Harbor. 453 U.S. at 4-5. The suit was brought as an implied private right of action under the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1376, and the Marine Protection, Research, and Sanctuaries Act of 1972, 33 U.S.C. §§ 1401-1444. 453 U.S. at 4. Relying on the "elaborate enforcement provisions" of the statutes, the Court held that Congress did not intend to create any implied private rights of action under the Acts. 453 U.S. at 12-15. Although not raised by the parties, the Court also considered whether a § 1983 action would be available to respondents. 453 U.S. at 19. In making its § 1983 inquiry, the Court once again relied on the comprehensive enforcement provisions of the statutes, this time as evidence that Congress intended to foreclose § 1983 remedies. 453 U.S. at 19-21.

As in the statutes at issue in *Sea Clammers*, Congress' intent to foreclose private enforcement of HUD utility regulations is evidenced by the comprehensive enforcement

framework supporting the Housing Act subsidy program of which the utility regulations are a part. This subsidy enforcement scheme centers on HUD's enforcement authority under the Housing Act, the ACC, and agency regulations. Private enforcement of HUD utility regulations under § 1983 clearly is inconsistent with the congressional intent underlying the federal housing program.

1. The Comprehensive Enforcement Scheme Created By The Housing Act And HUD Subsidy Program Demonstrates Congressional Intent To Preclude A § 1983 Action In This Case.

The comprehensive enforcement framework created by the Housing Act, HUD utility regulations, and the ACC evinces Congress' intent that HUD, not a private litigant, is responsible for insuring PHA compliance with the utility regulations at issue in this case. Indeed, the regulations expressly require that HUD approve PHA-created utility allowances before they become effective. 24 C.F.R. § 865.473(a) (1980). HUD also conducts audits to evaluate PHA compliance. ACC § 311 (R. 30).

In the case of federal-state funding schemes, like that created by the Housing Act and the utility regulations, the typical remedy for state noncompliance with federally-imposed conditions is termination of funding by the federal government, not a private cause of action. *See Guardians Ass'n v. Civil Service Comm'n*, 463 U.S. 582, 596-97 (1983); *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 28 (1981). The practical result is that whenever HUD speaks, a PHA listens.

RRHA, like all housing authorities participating in the federal housing program, operates its low-income projects with federal subsidies pursuant to an Annual Contributions Contract. The ACC is expressly required by Congress, 42 U.S.C. § 1437c (1985), and establishes the

relatively straightforward obligations of the PHA and HUD in providing low-cost public housing: HUD agrees to provide funds and the PHA agrees to comply with HUD requirements for the development and operation of its public housing projects. ACC §§ 2, 5, 7 (R. 30). If a housing authority breaches any of its obligations under the ACC, HUD has "the right . . . to maintain any and all actions at law or in equity against the Local Authority (PHA) to enforce correction of any such default or breach." ACC § 508 (R. 30).

Petitioners' assertion that termination of federal funding is not an available remedy when the PHA has pledged federal monies as security for payment of PHA-issued bonds. (Brief of Petitioners, p. 39), ignores the fact that this case deals solely with PHA operating funds, not PHA construction funds.[16] In fact, the ACC *does* provide for the termination of federal funds not pledged to secure PHA bonds as a remedy for PHA violations.

ACC § 401 provides for the creation of a "General Fund" into which is deposited *all* monies received by or held for account of the PHA in connection with its projects, except those funds pledged as security for the payment of principal and interest on PHA bonds. ACC § 401 (A) (R. 30). That same section provides that if a PHA is in substantial breach of the ACC, the government has a right to require the bank or other depository holding

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[16]The Housing Act and the ACC require complex bond arrangements to finance construction of public housing projects. To protect the integrity of PHA-issued bonds, and thus insure a continued flow of private funds, HUD unconditionally guarantees payment of federal funds pledged to secure those bonds. ACC §§ 509, 510 (R. 30). Although the ACC establishes that pledged federal funds may not be terminated by HUD, it does create in HUD an equally-potent alternative remedy—repossession of the project. ACC §§ 501, 502 (R. 30).

the monies of the General Fund to refuse to permit any withdrawals of such monies until the defect or breach is cured. ACC § 401(F) (R. 30). Clearly, then, the government retains the right and ability to withhold or terminate federal funds for most violations of the ACC.

The Housing Act, the interim regulations, and the Annual Contributions Contract create a comprehensive enforcement scheme centered around HUD. Under this framework, HUD maintains responsibility for establishing guidelines by which reasonable utilities are provided to tenants. 24 C.F.R. § 865.470 (1980). In addition, HUD has the duty to approve proposed PHA-calculated utility allowances and to thereafter monitor their implementation. 24 C.F.R. § 865.473 (1980). To remedy violations of the funding program, HUD specifically maintains the power in certain circumstances described above to (a) sue PHAs for breach of HUD regulations or the ACC (ACC § 508); (b) terminate or withhold federal funds (ACC §§ 401(F), 509); or (c) wrest possession of the project from the PHA (ACC §§ 501, 502). Petitioners' suit to enforce their individual claims of right against RRHA has no place in this framework.[17]

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[17]Given HUD's central role in the administration and enforcement of the interim utility regulations, it is clear that HUD, rather than RRHA, is the proper party against which petitioners should seek relief. *See, e.g., Howard v. Pierce,* 738 F.2d 722 (6th Cir. 1984) (private right of action available against HUD, but not the PHA). If petitioners can establish that HUD has refused to enforce a valid regulation, they have an action against HUD under the Administrative Procedure Act, 5 U.S.C. §§ 701-706 (1980). *See also Heckler v. Chaney,* 53 U.S.L.W. 4385, 4389 (U.S. Mar. 19, 1985) (Brennan, J., concurring). Under the APA, HUD's exercise of discretion will be reviewed on an "arbitrary and capricious" basis—a standard of review far more appropriate in this context than substantive judicial review of HUD regulations as individual claims of right.

To complement the all-encompassing role it affords HUD in the formulation and enforcement of the utility allowance regulations, Congress has created in tenants a means for obtaining individual relief from excessive PHA utility surcharges. In 42 U.S.C. § 1437d(k) (1985), Congress requires that HUD by regulation establish mandatory grievance guidelines to be implemented by PHAs. Congress expressly mandated the grievance mechanism in order to retain "a realistic means for resolving disputes between tenants and PHAs quickly and fairly, before problems fester and hostilities develop."[18] H.R. Rep. No. 123, 98th Cong., 1st Sess. 35-36 (1983). *See Samuels v. District of Columbia,* 770 F.2d 184, 200-201 (D.C. Cir. 1985) (legislative history of § 1437d(k) establishes that the provision "is aimed at avoiding costly and divisive litigation between tenants and PHAs.")

Congress contemplated that the grievance procedure extend to "all disputes between a PHA and an applicant, a tenant or a former tenant." H.R. Rep. No. 123, 98th Cong., 1st Sess. 35 (1983). The HUD regulations carry this intent forward by providing that the grievance procedure shall apply to "any [individual] dispute which a tenant may have with respect to PHA action or failure to act in accordance with the individual tenant's lease or PHA regulations which adversely affect the individual tenant's rights, duties, welfare or status." 24 C.F.R. §§ 966.51, 966.53(a) (1985).[19] The grievance mechanism

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[18]Indeed, Congress added the grievance procedure to the Housing Act, 42 U.S.C. § 1437d(k) (1985), in 1983 in response to a HUD proposal to repeal its then-existing regulations concerning tenant administrative grievance requirements. H.R. Rep. No. 123, 98th Cong., 1st Sess. 35 (1983).

[19]Petitioners correctly note that the PHA grievance procedure does not apply to class grievances. 24 C.F.R. § 966.51

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thus broadly encompasses petitioners' individual utility claims in this case.

Congressional intent is thus clear. HUD has the overall responsibility for promulgating and enforcing PHA compliance with the utility subsidy regulations. To augment the vast enforcement responsibility of HUD and to ensure efficient, effective redress of individual tenant grievances arising from improperly calculated utility allowances, Congress has provided tenants a local grievance procedure. The congressional purpose evidenced by the grievance procedure is to provide tenants individual relief from PHA wrongdoing in an administrative forum that does not disrupt or threaten HUD's overall authority of the housing subsidy program. In establishing this express framework, Congress necessarily intended to preclude petitioners' § 1983 remedy.

2. A Determination Of Whether A § 1983 Cause Of Action Is Foreclosed Under Sea Clammers Need Not Be Limited To Consideration Of Express Enunciation Of Congressional Intent.

Read in conjunction with *Maine v. Thiboutot*, 448 U.S. 1 (1980), this Court's decision in *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981), suggests that a § 1983 defendant has the burden of establishing congressional intent to foreclose a § 1983 remedy. *See* 453 U.S. at 12 n.31, 27-28 n.11. In applying the *Sea Clammers* standard, however, direct

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(1985). This limitation, however, does not foreclose effective redress of *individual* tenant surcharge complaints through the grievance process. Petitioners' dissatisfaction with the individual grievance remedy cannot rebut the reality that Congress provided this scheme as an enunciation of its intent to foreclose federal judicial enforcement in these cases.

evidence of Congress' intent to foreclose a § 1983 remedy under a particular statute often is unavailable. In the absence of an express enunciation of congressional foreclosure of private remedies, legislative intent also may be established by an examination of the overall framework of the statute.

The ascertainment of congressional intent to foreclose private remedies under § 1983 and the delineation of the proper role of the federal judiciary in reviewing and enforcing federal grant legislation are based on similar public policy considerations. Either analysis focuses on the single question of congressional purpose: How can federal courts best determine the manner in which Congress intended a particular federal grant program to operate? Did Congress intend to give public housing tenants a cause of action against their PHAs for alleged violations of technical HUD utility regulations? Did Congress intend the courts to take responsibility for setting utility allowances and for reviewing individual claims of right and imposing discretionary surcharges on tenants?

Prior to this Court's 1980 decision in *Maine v. Thiboutot*, 448 U.S. 1 (1980), there was little thought that a § 1983 action was available outside the civil rights context. *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600 (1979); *Hagans v. Lavine*, 415 U.S. 528, 534 n.5 (1974) (specifically reserving the question of scope of "and laws" language in § 1983). Thus, prior to 1980, the question of whether Congress intended private enforcement of a particular non-civil rights statute was resolved using the implied right of action analysis set out in *Cort v. Ash*, 422 U.S. 66 (1975).[20] Under the implied rights test, the

[20] *Cort v. Ash*, 422 U.S. 66 (1975), sets out four factors to be assessed in determining whether a private right of action should

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burden of proof falls on the plaintiff, who must show that Congress intended to create a private cause of action under the statute. *Sea Clammers,* 453 U.S. at 13.

After this Court's decision in *Thiboutot,* § 1983 was perceived as a more pervasive sword, providing an express private remedy for state violations of all federal statutes. 448 U.S. at 4. This Court, however, still looked to congressional intent to evaluate the impact of the § 1983 action on the statutory purpose of Congress, *Sea Clammers,* 453 U.S. at 20, although the burden of proof appears to fall on the defendant to show that Congress intended to foreclose a § 1983 action. 453 U.S. at 12 n.31, 27-28 n.11.

Although the burden of proof under *Cort* and *Thiboutot* differs, the cases enunciate the same essential test—congressional intent—and thus rely on the same elements of proof. This fundamental evidentiary issue of congressional purpose common to the intersection of *Cort* and *Thiboutot,* provides a clear traffic signal to direct the travel of both the express remedy created by § 1983 and the private remedy implied under the test of *Cort v. Ash.*

Petitioners assert that a § 1983 plaintiff may maintain a § 1983 cause of action in the absence of express con-

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be implied: (1) whether the statute was enacted to benefit the plaintiff, (2) whether there is an explicit or implicit indication of congressional intent to create or deny a private right, (3) whether a private right is consistent with the underlying scheme of the act, and (4) whether the contemplated right of action is traditionally relegated to state law, thus making it inappropriate to infer an exclusively federal cause of action. Subsequent cases have placed greatest importance on the second *Cort* factor, indicating that congressional intent is the threshold question in determining whether courts may imply a private right of action. *Transamerica Mortgage Advisors, Inc. v. Lewis,* 444 U.S. 11, 15-16 (1979); *Touche Ross & Co. v. Redington,* 442 U.S. 560, 575 (1979).

gressional intent to the contrary. (Brief of Petitioners, p. 29.) Petitioners thus decry the Fourth Circuit's reliance on the broad framework of the Housing Act and HUD's regulatory power to support its conclusion that Congress intended to foreclose private enforcement of the HUD utility allowance regulations in this case. (Brief of Petitioners, pp. 10, 34-40.) Petitioners assert that the *Sea Clammers* inquiry should have ended with the circuit court's finding that a § 1983 remedy was not expressly precluded under the Housing Act. This position, however, fails to recognize that at the time the Housing Act (and Brooke Amendment) were enacted, a § 1983 action was recognized only for state violations of federal civil rights statutes. *See Chapman v. Houston Welfare Rights Org.,* 441 U.S. at 600; *Hagans v. Lavine,* 415 U.S. at 534 n.5. It is illogical to expect that Congress in enacting the Housing Act and Brooke Amendment would have explicitly provided, either in the statutes or their legislative histories, foreclosure of a cause not yet believed to exist. Brown, *Whither Thiboutot? Section 1983, Private Enforcement, and the Damages Dilemma,* 33 DePaul L. Rev. 31, 57 (1983).

In asserting that Congress' silence is dispositive as to the availability of a § 1983 cause of action in suits involving non-civil rights statutes enacted prior to *Thiboutot,* petitioners confuse the burden of proof question with the evidentiary question of congressional intent. The outcome-determinative presumption propounded by petitioners as the proper focus of this Court's *Sea Clammers* analysis is merely an expression of the test for allocating the burden of proof. While *Sea Clammers* arguably assigns a § 1983 defendant the burden of proof, the test of

evidence required to meet that burden is the evidence of congressional purpose.

Given the improbability that Congress would have expressly stated an intent to foreclose § 1983 actions to enforce pre-*Thiboutot* enactments like the Housing Act and Brooke Amendment, the most logical *Sea Clammers* analysis in this situation requires that the Court look beyond the legislature's enunciated view of foreclosure to determine congressional intent. Thus, use of the broader *Cort* standard is appropriate in this circumstance because "it is the only extant mode of analysis for dealing with this phenomenon of statutes that are silent as to alternative methods of enforcement." Brown, *Whither Thiboutot?*, pp. 57-58.

Merger of the *Cort* test with the *Thiboutot* test is hardly a revoluntionary proposal. The *Cort* test, like the *Thiboutot* test, depends upon legislative intent. *Transamerica Mortgage Advisors Inc. v. Lewis*, 444 U.S. 11, 24 (1979). The *Cort* test, however, has the advantage of defining the additional factors a court must consider when a statute offers no direct evidence of congressional purpose: (a) whether the plaintiff is an intended beneficiary of the statute, (b) whether a private right is consistent with the underlying scheme of the act, and (c) whether the plaintiff's right of action is traditionally one governed by state law.

Application of the *Cort* standard to the facts of the instant case quite readily establishes that a § 1983 action to enforce HUD utility regulations is inappropriate.

The Housing Act expressly states that its purpose is "to assist the *States*" in providing decent, safe and sanitary housing to low-income families. Petitioners are not direct beneficiaries of the Housing Act subsidy program. *See supra* p. 23. (*Cort* factor (a).) The entire scheme of the Act centers on HUD. HUD promulgates regulations governing the utility subsidy and monitors the implementation and enforcement of those regulations by PHAs. Private suits to enforce individual claims of right disrupt HUD autonomy and undermine the coherence and effectiveness of HUD's funding allocation and policy objectives. Moreover, the congressional goal of fostering state involvement in the national housing program would be undermined by subjecting PHAs to potential § 1983 damage claims every time a tenant objects to a charge for use of electricity in excess of "reasonable" standards. *See supra* pp. 14-22. (*Cort* factor (b).) Finally, petitioners' action against RRHA in this case is in essence a landlord-tenant dispute. The local landlord-tenant relationship is one historically governed by state law. *See infra* pp. 38-42. (*Cort* factor (c).)

The inquiry into whether Congress intended to foreclose a § 1983 action to enforce non-civil rights statutes enacted prior to *Thiboutot* logically cannot turn only on evidence of expressly articulated congressional purpose. Congress could not be expected to expressly foreclose a remedy which was not yet recognized. To determine congressional intent in this situation, a broader analysis of the nature and purpose of the statute and the practical effect a § 1983 remedy would have on the overall scheme of the enactment necessarily must be considered. This is particularly true where the § 1983 rights claimed by petitioners arise from agency regulations promulgated pursuant to a national subsidy program, rather than from direct

congressional action. Nevertheless, even under the narrower *Sea Clammers* analysis propounded by petitioners, the congressional framework of the Housing Act, the congressionally-mandated ACC and tenant grievance procedure, and HUD's ability to control or terminate PHA funding evidences a clear congressional intent to foreclose a § 1983 action to enforce the HUD utility allowance regulations.

II. Petitioners' Claim That RRHA Breached Its Lease With Its Tenants Is A Pendent Claim For Which Federal Jurisdiction Cannot Exist Independent Of Petitioners' § 1983 Claim.

Tenants of public low-income housing occupy their units subject to the requirements of their residential lease contract with the managing PHA. The lease governs such fundamental tenant issues as occupancy, rent, security deposits, and damage and repair. It also defines the management obligations and operating procedures of the PHA, including maintenance, termination of the lease, inspection of the premises, and tenant grievances. *See generally* RRHA Lease (R. 5, exh. H).

Petitioners argue that RRHA's alleged failure to furnish them with free "utilities as reasonably necessary" pursuant to paragraph 4 of the lease agreement between RRHA and its tenants raises a question of federal law. (Brief of Petitioners, p. 44.) The lease between RRHA and petitioners, however, creates an archetypical landlord-tenant relationship, the dynamics of which properly and necessarily are governed by state law. Petitioners recognize this and agree that "[t]he tenants' claim on their lease is a classic contract action recognized in the common law. ..." (Brief of Petitioners, p. 45.)

In an attempt to elevate their state lease claim to a matter of federal law, petitioners principally rely on *Gully v. First National Bank,* 299 U.S. 109 (1936). In *Gully,* this Court acknowledged that 28 U.S.C. § 1331 may give federal courts jurisdiction of state-created actions where "a right or immunity created by the Constitution or laws of the United States [is] an element, and an essential one, of the plaintiff's cause of action." 299 U.S. at 112. Such a federal claim must be apparent from the face of plaintiff's complaint. *Franchise Tax Board v. Construction Laborers Vacation Trust,* 463 U.S. 1 (1983). In *Gully,* however, the Court refused to find federal question jurisdiction in the petitioner's state-created cause of action, concluding that a federal statute permitting state taxation of shares of a national bank was not an "essential element" of petitioner's state law breach of contract claim for taxes against the respondent bank. 299 U.S. at 115 ("Not every question of federal law emerging in a suit is proof that federal law is the basis of the suit."). Similarly, in *Franchise Tax Board,* this Court found that the state tax authorities' suit to collect unpaid state income taxes by levying on funds held under an ERISA-covered benefit plan did not require resolution of a substantial question of federal law. 463 U.S. at 13, 21-22.

As in the *Gully* and *Franchise Tax Board* cases, federal law is merely incidental to petitioners' state lease claim in this action. Paragraph 4 of RRHA's standard lease contractually obligates RRHA to provide its tenants "utilities as reasonably necessary," the amounts of which are "posted on the bulletin board of each Housing Development office." RRHA Lease, ¶ 4 (R. 5, exh. H). Petitioners' alleged "right" to reasonable free utilities (*i.e.*,

the amount of the posted allowances) is created by the lease contract itself. Alleged deprivation of that state contractual right must necessarily be redressed in state court. If the fact that federal directives require RRHA to provide tenants the utility allowances described in the lease is accepted as a basis of federal jurisdiction, every provision of every public housing lease creates a federal cause of action.

The lease agreement between RRHA and petitioners, like all PHA-tenant leases, contains terms and conditions required by Congress, 42 U.S.C. § 1437d(1)(1985), and HUD, 24 C.F.R. §§ 966.1-.6 (1985) (S.A. 19-27). Indeed, RRHA's lease has its origin in the standard form recommended by HUD to insure PHA compliance with the long list of statutory and regulatory requirements. HUD Circular RHM 7465.8 (Feb. 2, 1971) (Appendix I) (*lodged with the Clerk for the convenience of the Court). Among the many federal obligations that the HUD regulations by lease impose upon a PHA are the requirements that the PHA (1) specify the utilities and quantities thereof furnished tenants without cost; (2) maintain the premises; (3) make repairs; (4) provide appropriate garbage receptacles; and (5) adhere to certain notice procedures. 24 C.F.R. § 966.4 (1985).

If a federal question could be found in the mere fact that the terms of the PHA standard lease are defined by federal regulation or statute, virtually every public housing landlord-tenant dispute would find its way into federal court. Pursuant to 42 U.S.C. § 1437d(1)(2)(1985) and 24 C.F.R. § 966.4(e)(1)(1985), paragraph 9 of the standard lease plainly provides:

> Management Agent will maintain the premises and the Housing Development in decent, safe and sanitary condition in conformity with the requirements of local housing codes *and applicable lawful regulations of the Department of Housing and Urban Development materially affecting health and safety.*

RRHA Lease, ¶ 9 (R. 5, exh. H) (emphasis added).

Accepting petitioners' argument that a state court's reference to federal regulations in reviewing the terms of a state-created landlord-tenant contract gives rise to a federal question, a tenant breach of contract claim premised on the PHA's failure to make repairs or to provide enough hot water could be brought before the federal courts as a violation of paragraph 9. Every broken door and window, every plumbing failure would be a federal issue. The federal courts would become the arbitrators of the most fundamental, and sometimes trivial, landlord-tenant disputes. The cause of federalism is in no way served by imposing on the already over-burdened federal judiciary responsibility for local landlord-tenant disputes, the resolution of which history has shown state courts so adept.

The true purpose of petitioners' argument is revealed in their correct assertion that Virginia recognizes no class action remedy. (Brief of Petitioners, p. 49.) In seeking federal resolution of their state-created contract claims, petitioners attempt to supplant the available state court remedies for violations of ordinary contract and lease rights. Petitioners' contention that resolution of tenant lease claims can be accomplished in Virginia only in state courts not of record is inaccurate. (Brief of Petitioners, p. 49.) In truth, an appeal to a circuit court of record lies as a matter of right from a court not of record in all cases in which the matter in controversy exceeds

$50.00. Va. Code § 16.1-106 (1982 (S.A. 7). Certainly, most tenant lease claims, including those in the instant case, would meet this state jurisdictional threshold for a court of record determination. Petitioners' landlord-tenant lease claim is properly a matter for state court adjudication. Petitioners' dissatisfaction with state-created remedies does not change the essential nature of that claim.

III. Damages Should Not Be An Available Remedy Under § 1983 Where The Source Of Recovery Will Be Federal Grant Monies.

Petitioners seek as their sole remedy in this § 1983 action compensatory damages in the amount of the utility surcharges collected by RRHA in alleged violation of HUD's allowance scheme. This Court has recognized, however, that such "make whole" remedies are inappropriate in private actions to redress unintentional violations of federal funding programs by recipients of government funds. *Guardians Ass'n v. Civil Service Comm'n,* 463 U.S. 582, 596 (1983) (White, J., plurality) (citing *Pennhurst State School and Hospital v. Halderman,* 451 U.S. 1, 15 (1981)). Thus, even if petitioners are found to have stated a private statutory claim cognizable in federal court, the sole remedy they seek—compensatory damages—is unavailable in the context of the federal housing program. Whether a litigant has a cause of action "is analytically distinct and prior to the question of what relief, if any, a litigant may be entitled to receive." *Davis v. Passman,* 442 U.S. 228, 239 (1979).

The threat that § 1983 damages and awards of attorneys' fees present to the effective administration of grant programs was recognized by this Court in *Pennhurst State*

School and Hospital v. Halderman, 451 U.S. 1 (1981). In that case, the majority suggested that the remedy for failure to comply with federally-imposed conditions should be limited to prospective relief. 451 U.S. at 29. Relying on *Pennhurst,* Justice White in a plurality opinion in *Guardians Ass'n v. Civil Service Comm'n,* 463 U.S. 582, 599 (1983), adopted a presumption that a damage remedy should not be available for unintentional violations of programs created pursuant to the congressional spending power.[21]

In *Guardians,* minority police officers challenged written examinations administered by New York City to make appointments to the City Police Department. The plaintiffs claimed that the examination had a discriminatory impact on the scores, pass rates and subsequent lay-offs of minority officers. 463 U.S. at 585. The officers' claim was brought under several theories, including Titles VI and VII of the Civil Rights Act of 1964. A § 1983 claim for damages was made based on the violation of Title VI.[22]

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[21]This presumption that damages are unavailable for violations of Spending Clause legislation can be rebutted by persuasive evidence of contrary legislative intent. *Guardians,* 463 U.S. at 599 (White, J., plurality). In the present instance, petitioners have provided no evidence that Congress intended public housing tenants to obtain damage awards through private enforcement of HUD regulations.

[22]A review of the Justices' positions reveals that *Guardians* was not a true § 1983 case, although its rationale for a no-damages presumption remains valid for § 1983 purposes. *See infra* pp. 44-47. In *Guardians,* Justice White, joined by Justice Rehnquist, applied implied private rights language to review the availability of private enforcement of Title VI and concluded that damages should not be available for such violations. 463 U.S.

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463 U.S. at 586. Justice White concluded that the remedy available for unintentional violations of federal grant programs necessarily must be limited to prospective relief, recognizing the privilege of the recipient of federal funds to withdraw and terminate its receipt of federal money rather than assume the cost of complying with court-imposed burdens. 463 U.S. at 596 (citing *Rosado v. Wyman*, 397 U.S. 397, 420-21 (1970)).

Implicit in Justice White's analysis in *Guardians* is the recognition that voluntary federal-state grant programs, such as the public housing program, provide valuable social benefits that Congress seeks to encourage through federal subsidy. The spectre of unpredictable liability for damages and attorneys' fees for violations of complex calculation schemes like that of the interim utility regulations in this case cannot but operate as a disincentive to state actors contemplating participation in grant programs. Furthermore, such monetary awards and

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at 584. Justice Powell and Chief Justice Burger, likewise, examined the case under an implied right of action analysis, finding no private rights existed and adding that § 1983 causes of action are unavailable where violations of Title VI are concerned. 463 U.S. at 610 n.3. Justice O'Connor expressly reserved judgment on the issue of the availability of a private cause of action under Title VI. 463 U.S. at 613 n.1. Justice O'Connor's conclusion that the minority police officers in *Guardians* failed to prove intentional discrimination as required under Title VI regulations provided the fifth vote in finding that damages were unavailable to the claimants. 463 U.S. at 613. Justice Marshall's dissent flatly rejected Justice White's no-damages presumption, but did so without specific reference to § 1983. 463 U.S. at 615. Justices Stevens, Brennan, and Blackmun dissented, specifically raising the minority officers' reliance on § 1983 under *Thiboutot* and the general availability of damages under that statute. 463 U.S. at 635.

the cost of litigation divert limited federal funds allocated by Congress for specific program goals away from their most effective uses, thereby frustrating the purposes of the statute involved.

As in *Guardians*, RRHA's receipt of federal funds during the pendency of the interim utility regulations arose from a consensual federal-state relationship. Prior to entering the housing program, HUD defined and evaluated RRHA's plan for compliance, and RRHA evaluated the benefits and burdens of the federal conditions tied to receipt of government funds. Petitioners' assertion that HUD financially benefits by failing to enforce the now-defunct interim regulations entirely misses the point that HUD set the rate of utility allowances in the first place and that HUD—and RRHA—operate on limited budgets. The monetary relief petitioners seek must come from somewhere. Such relief necessarily has its source in other funded projects and is provided at the expense of other individuals in need of government aid, indeed, at the expense of the petitioners themselves as residents of RRHA-managed public housing.[23]

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[23]Cognizant of the implication in *Guardians* that monetary damages are inappropriate for alleged violations of Spending Clause legislation, petitioners attempt to characterize the relief they seek as "restitution." Mere semantics, however, cannot overcome the *Guardians* rationale that retrospective monetary relief in the context of federal grant programs discourages voluntary state participation in vital programs, diverts funds from the specific program goals Congress sought to address and usurps agency discretion to determine the best allocation of limited federal resources. Indeed, in his opinion in *Guardians*, Justice White relied on *Edelman v. Jordan*, 415 U.S. 651, 667 (1974), to specifically find that "relief in the grant context cannot

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Private enforcement suits involving government spending programs can be evaluated only in a broad context which takes into account the total public effort involved. Public grant programs that rely on federal financial aid necessarily achieve only rough justice. The programs distribute limited funds to a limited sector of the problem population. Consistent with these limitations, a federal agency, HUD in this case, has the ability and resources to remedy only the most pervasive violations of its public projects. And, consonant with this view, it often may be improper and counterproductive for the judiciary to attempt specific justice, particularly where such relief includes damage awards. When a program's funds are diverted from program goals in order to pay damage awards and attorneys' fees to an aggrieved individual, another needy person is denied necessary benefits or services. *See* R. Cappalli, *Grants and Cooperative Agreements* § 8:37 (1982). In this context, HUD must be free to allocate its limited funds to projects that HUD, in its discretion, believes will best advance its goals for a cohesive national housing program.

During HUD audits of public housing authorities a large number of technical violations often come to light. HUD must exercise its discretion to balance numerous tenant claims to achieve the most effective allocation of limited agency funds. As this Court noted in *Heckler v.*

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include a monetary award for past wrongs, even if the award is in the form of 'equitable restitution' instead of damages." 463 U.S. at 604.

Chaney, 53 U.S.L.W. at 4387, a court with but a single technical violation before it, cannot properly analyze the funding decisions facing agency officials. This point was correctly recognized by the Fourth Circuit below. (J.A. 36 n.7).

HUD is uniquely positioned to know where its limited funds can be put to best use. Judicially-imposed § 1983 damage awards can only hinder the effective allocation of those funds. This Court's holding in *Bell v. New Jersey*, 461 U.S. 773, 794 (1983) (White, J., concurring), clearly confirms the power of the federal government to assert its rights against a grant recipient that fails to comply with the terms of a grant agreement and to force the violator to repay misspent funds. It is an entirely different matter, however, to subject a state grantee to open-ended liability at the hands of private plaintiffs under § 1983. *Guardians*, 463 U.S. at 603 n.24 (White, J., plurality).

If this Court believes that petitioners should have a § 1983 cause of action against RRHA to challenge RRHA's alleged violation of HUD utility allowance regulations, the only practical remedy available to petitioners is prospective injunctive relief. Such relief has long been foreclosed by RRHA's recalculation of its utility allowances in response to HUD's latest amendment of its regulatory scheme. (R. 33).

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CONCLUSION

For these reasons, the judgment of the Court of Appeals for the Fourth Circuit dismissing petitioners' action should be affirmed.

Respectfully submitted,

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STATUTORY APPENDIX

42 U.S.C. § 1983. Civil action for deprivation of rights (1985)

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

28 U.S.C. § 1331. Federal question (1985)

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

42 U.S.C. § 1437. Declaration of policy (1985)

It is the policy of the United States to promote the general welfare of the Nation by employing its funds and credit, as provided in this Act, to assist the several States and their political subdivisions to remedy the unsafe and unsanitary housing conditions and the acute shortage of decent, safe, and sanitary dwellings for families of lower income and, consistent with the objectives of this Act [42 USCS §§ 1437-1437j], to vest in local public housing agencies the maximum amount of responsibility in the administration of their housing programs. No person should be barred from serving on the board of directors or similar governing body of a local public housing agency because of his tenancy in a lower income housing project.

42 U.S.C. § 1437a. Rental payments; definitions (1985)

(a) Dwelling units assisted under this Act shall be rented only to families who are lower income families at

the time of their initial occupancy of such units. Reviews of family income shall be made at least annually. A family shall pay as rent for a dwelling unit assisted under this Act (other than a family assisted under section 8(o) [42 USCS § 1437f(*o*)] the highest of the following amounts, rounded to the nearest dollar:

(1) 30 per centum of the family's monthly adjusted income;

(2) 10 per centum of the family's monthly income; or

(3) if the family is receiving payments for welfare assistance from a public agency and a part of such payments, adjusted in accordance with the family's actual housing costs, is specifically designated by such agency to meet the family's housing costs, the portion of such payments which is so designated.

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42 U.S.C. § 1437c. Annual contributions for lower income housing projects (1985)

(a) The Secretary may make annual contributions to public housing agencies to assist in achieving and maintaining the lower-income character of their projects. The Secretary shall embody the provisions for such annual contributions in a contract guaranteeing their payment. The contribution payable annually under this section shall in no case exceed a sum equal to the annual amount of principal and interest payable on obligations issued by the public housing agency to finance the development or acquisition cost of the lower-income project involved. The amount of annual contributions which would be established for a

newly constructed project by a public housing agency designed to accommodate a number of families of a given size and kind may be established under this section for a project by such public housing agency which would provide housing for the comparable number, sizes, and kinds of families through the acquisition and rehabilitation, or use under lease, of structures which are suitable for lower-income housing use and obtained in the local market. Annual contributions payable under this section shall be pledged, if the Secretary so requires, as security for obligations issued by a public housing agency to assist the development or acquisition of the project to which annual contributions relate and shall be paid over a period not to exceed forty years.

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42 U.S.C. §1437d(k) (1985)

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(k) The Secretary shall by regulation require each public housing agency receiving assistance under this Act to establish and implement an administrative grievance procedure under which tenants will—

(1) be advised of the specific grounds of any proposed adverse public housing agency action;

(2) have an opportunity for a hearing before an impartial party upon timely request within any period applicable under subsection (*l*);

(3) have an opportunity to examine any documents or records or regulations related to the proposed action;

(4) be entitled to be represented by another person of his choice at any hearing;

(5) be entitled to ask questions of witnesses and have others make statements on his behalf; and

(6) be entitled to receive a written decision by the public housing agency on the proposed action.

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42 U.S.C. § 1437f (1985)

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(c) (1) An assistance contract entered into pursuant to this section shall establish the maximum monthly rent (including utilities and all maintenance and management charges) which the owner is entitled to receive for each dwelling unit with respect to which such assistance payments are to be made. The maximum monthly rent shall not exceed by more than 10 per centum the fair market rental established by the Secretary periodically but not less than annually for existing or newly constructed rental dwelling units of various sizes and types in the market area suitable for occupancy by persons assisted under this section, except that the maximum monthly rent may exceed the fair market rental by more than 10 but not more than 20 per centum where the Secretary determines that special circumstances warrant such higher maximum rent or that such higher rent is necessary to the implementation of a local housing assistance plan as defined in section 213(a)(5) of the Housing and Community Development Act of 1974 [42 USCS § 1439(a)(5)]. In the case of newly constructed and substantially rehabilitated units, the exception in the preceding sentence shall not apply to more than 20 per centum of the total amount of authority to enter into annual contributions contracts for such units which is allocated to an area and obligated with respect to any fiscal year beginning on or after October 1, 1980. Proposed fair market rentals

for an area shall be published in the Federal Register with reasonable time for public comment, and shall become effective upon the date of publication in final form in the Federal Register. Notwithstanding any other provision of this section, after the date of enactment of the Housing and Community Development Act of 1977 [enacted Oct. 12, 1977], the Secretary shall prohibit high-rise elevator projects for families with children unless there is no practical alternative.

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(j) (2)(A) A contract entered into pursuant to this paragraph shall establish the maximum monthly rent (including maintenance and management charges) which the owner is entitled to receive for the space on which a manufactured home is located and with respect to which assistance payments are to be made. The maximum monthly rent shall not exceed by more than 10 per centum the fair market rental established by the Secretary periodically (but not less than annually) with respect to the market area for the rental of real property suitable for occupancy by families assisted under this paragraph.

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UNITED STATES HOUSING ACT, Ch. 896, § 2, 50 Stat. 888 (1937)

When used in this Act—

(1) The term "low-rent housing" means decent, safe, and sanitary dwellings within the financial reach of families of low income, and developed and administered to promote serviceability, efficiency, economy, and stability, and embraces all necessary appurtenances thereto. The dwellings in low-rent housing as defined in

this Act shall be available solely for families whose net income at the time of admission does not exceed five times the rental (including the value or cost to them of heat, light, water, and cooking fuel) of the dwellings to be furnished such families, except that in the case of families with three or more minor dependents, such ratio shall not exceed six to one.

PUB. L. No. 86-372, § 503, 73 Stat. 654 (1959)

(a) Paragraph (1) of section 2 of the United States Housing Act of 1937 is amended to read as follows:

"(1) The term 'low-rent housing' means decent, safe, and sanitary dwellings within the financial reach of families of low income, and developed and administered to promote serviceability, efficiency, economy, and stability, and embraces all necessary appurtances thereto. The dwellings in low-rent housing shall be available solely for families of low income. Income limits for occupancy and rents shall be fixed by the public housing agency and approved by the Authority after taking into consideration (A) the family size, composition, age, physical handicaps, and other factors which might affect the rent-pay ability of the family, and (B) the economic factors which affect the financial stability and solvency of the project."

(b) Paragraph (7) (b) of section 15 of such Act is amended by inserting after "a gap of at least 20 per centum" the following "(or 5 per centum in the case of any family entitled to a first preference as provided in section 10(g)".

PUB. L. No. 91-152, § 213(a), 83 Stat. 389 (1969)

The second paragraph of section 2(1) of the United States Housing Act of 1937 is amended by inserting after "rents" the following: "(which may not exceed one-fourth of the family's income, as defined by the Secretary)".

Va. Code § 16.1-106 (1982)

§ 16.1-106. Appeals from courts not of record in civil cases.—From any order entered or judgment rendered in a court not of record in a civil case in which the matter in controversy is of greater value than fifty dollars, exclusive of interest, any attorney's fees contracted for in the instrument, and costs, or when the case involves the constitutionality or validity of a statute of the Commonwealth, or of an ordinance or bylaw of a municipal corporation, there shall be an appeal of right, if taken within ten days after such order or judgment, to a court of record. Such appeal shall be to a court of record having jurisdiction within the territory of the court from which the appeal is taken. (1956, c. 555; 1977, c. 624.)

24 C.F.R. § 865.470 Purpose. (1980)

The purpose of §§ 865.470 through 865.482 is to establish procedures to be used by PHAs in establishing and administering Allowances for PHA-Furnished Utilities and Allowances for Tenant-Purchased Utilities. Allowances for PHA-Furnished Utilities represent the maximum consumption units (e.g., kilowatt hours of electricity) which may be used by a dwelling unit without a surcharge for excess consumption against the tenant. Allowances for Tenant-Purchased Utilities represent fixed dollar

amounts which are deducted from the Gross Rent otherwise chargeable to a tenant who pays the actual Utility charges directly to the Utility suppliers whether they be more or less than the amounts of the Allowances.

24 C.F.R. § 865.471 Applicability. (1980)

(a) Except as provided in paragraph (b) of this section, §§ 865.470 through 865.482 apply to all dwelling units assisted under the United States Housing Act of 1937 in projects owned by or leased to PHAs and leased or subleased by PHAs to tenants, except the Section 8 Housing Assistance Payments Program and the Mutual Help Homeownership Opportunities Program.

(b) Sections 865.470 through 865.482 do not apply to dwelling units which are served by PHA-Furnished Utilities unless Checkmeters have been installed to measure the actual Utilities consumption of the individual units but tenants in such units are subject to charges for consumption of tenant-owned major appliances in accordance with § 866.4 of this chapter.

24 C.F.R. § 865.472 Definitions. (1980)

Checkmeter. A device for measuring Utility consumption of each individual dwelling unit where the Utility service is supplied through a Mastermeter System. The PHA pays the Utility supplier for the Utility service on the basis of the Mastermeter readings and uses the Checkmeters to determine whether and to what extent of the Utility consumption of each dwelling unit is in excess of the Allowances for PHA-Furnished Utilities.

Contract Rent. The amount of rent payable by the tenant to the PHA. In the case of PHA-Furnished Utilities, the Contract Rent is the same as the Gross Rent. In the case of Tenant-Furnished Utilities the Contract Rent is the Gross Rent minus the amount of the Allowances for Tenant-Purchased Utilities. This definition of Contract Rent is not the same as contract rent for purposes of 24 C.F.R. Parts 880 to 889.

Gross Rent. The rent chargeable to a tenant for the use of the dwelling accommodation and equipment (such as range and refrigerator, but not including furniture), services, and Utilities not to exceed the Allowances for PHA-Furnished Utilities or the Allowances for Tenant-Purchased Utilities, as applicable. This definition of Gross Rent is not the same as gross rent for purposes of 24 C.F.R. Parts 880 to 889.

Mastermeter System. A Utility distribution system in which a PHA is supplied Utility service by a Utility supplier through a meter or meters and the PHA then distributes the Utility service to its tenants.

Surcharge. The amount charged by the PHA to a tenant, in addition to the tenant's Contract Rent, for consumption of Utilities in excess of the Allowance of PHA-Furnished Utilities included in the Contract Rent.

Utility. Electricity, gas, heating fuel, water and sewage service, and trash and garbage collection. Telephone service is not included as a Utility.

24 C.F.R. § 865.473 Establishment of allowances of PHAs. (1980)

(a) Basic Requirement. PHAs shall establish (1) allowances for PHA-Furnished Utilities for all Checkmetered Utilities and (2) allowances for Tenant-Purchased Utilities for all Utilities purchased directly by tenants

from the Utilities supplier. These Allowances shall be incorporated into the PHA's rent schedules and shall be submitted for approval by the HUD field office, after compliance with requirements of notice to tenants prescribed under 24 C.F.R. Part 861.

(b) Authorized Uses of Utilities on which Allowances Are Based. Allowances for both PHA-Furnished and Tenant-Purchased Utilities shall be designed to include Utility consumption requirements for major equipment furnished by the PHA (for example, heating furnace, hot water heater, range and refrigerator) and for minor items of equipment (such as toasters and can openers) furnished by the tenants. To avoid misunderstanding, the PHA shall include with the rent schedules a statement of the specific items of major equipment whose Utility consumption requirements were included in determining the amounts of the Allowances. This does not mean that tenants may not supply and use other items of major equipment, but if they do so the cost of any Utility consumption in excess of the applicable allowance will have to be borne by the tenant.

24 C.F.R. § 865.474 Dwelling Unit categories for establishing of allowances. (1980)

(a) Structure type Categories. Separate Allowances shall be established for each utility and for each category of dwelling units within structures which are reasonably comparable as to age and construction type, have the same utility combination and the same type and size of major equipment. Walk-up apartments, elevator buildings, row or townhouse dwellings, and detached or semi-detached dwellings shall constitute different structure types, but consideration may also be given to other major construc-

tion differences which have a significant effect on utility consumption. Generally, PHAs should include in the same structure type category all structures of similar design and equipment which were constructed at about the same time and are located within an area which experience very similar weather conditions.

(b) Scattered site units. In the case of scattered site dwelling units which were acquired by the PHA, with or without rehabilitation, the PHA shall determine to what extent the units are comparable so as to permit their being treated as one structure type category for purposes of establishing Allowances. If the number of units which can be reasonably so grouped is insufficient for this purpose (i.e., generally, less than 25 units), the PHA should include in its data base the best available Utility consumption data with respect to comparable units not in the PHA's program. In such cases, the PHA shall monitor the consumption experience of the units within its program as well as the non-PHA units, and thereafter revise its data base in light of that experience (see § 865.476).

(c) Dwelling Unit Categories by Size of Dwelling Unit. Within each structure type category, separate Allowances shall be established for units of different size, i.e., Efficiency or 0-bedroom, 1-bedroom, 2-bedroom, 3-bedroom, 4-bedroom, 5 or more-bedroom. Variations shall not be made for such factors as dimensions of the rooms or dwelling units and generally not by reason of factors such as upper or lower floor, number of exposed walls, or direction of exposure. However, if the PHA determines that there are sufficient differences between dwelling units it may dsignate a category to reflect those differences.

24 C.F.R. §§ 865.475 Charactristics of allowances. (1980)

(a) For PHA-Furnished Utilities. Preference shall be given to setting Allowances on a quarterly basis appropriately adjusted to reflect season variations, because this results in lower costs for meter reading and bookkeeping, and may also reduce the number of tenants surcharged due to averaging consumption over the three-month period. Monthly Allowances may be used where justified by special circumstances such as high tenant turnover or where excess consumption is extremely high. If in a locality the billing for a Utility, such as water and sewage service, is on a longer-term basis, such as semi-annually, the Allowance computed for that Utility may be set for a corresponding period and prorated to the quarterly allowance.

(b) Tenant-Purchased Utilities. The amount of the Allowance for Tenant-Purchased Utilities is deducted from the Gross Rent in computing the amount of the Contract Rent payable by the tenants to the PHA. Monthly Allowances shall be established at a uniform amount, based on average monthly utility requirements for a year; however where utility company level payment plans (customers of a utility company pay to the utility company a uniform amount each month) are unavailable to PHA tenants and a uniform monthly allowance may result in hardships the allowances established may provide for seasonal variations. HUD, if approving this action, will provide the PHA with instructions regarding adjustments necessary in the rental income estimates used for computation of operating subsidy payable under the Performance Funding System.

24 C.F.R. § 865.476 Data upon which allowances shall be based (PHA-Furnished and Tenant-Purchased Utilities). (1980)

(a) Where records are available for the particular housing. The portion of the Allowance applicable to each Utility shall be based upon the consumption records (consumption and cost records in the case of Tenant-Purchased Utilities) for the particular structure type category (§ 865.474) for the most current three-year period. Because of seasonal variations in the use of Utilities, each year shall consist of 12 consecutive months. If records are not available for a three-year period, the PHA shall use records for the most current two-year period or, if such records are unavailable, for the most current one-year period. If records are not available for the particular housing category for the entire year, records for the most comparable PHA housing will be used. Allowances based on records for only a one-year period should be adjusted for normal weather conditions.

(b) Where records are not available for the particular housing. For new housing or existing housing for which adequate records covering a full year are not available, the Allowances shall be based on records for the most comparable PHA housing in the area as to construction type and size of units, utility combinations, climatic conditions, and types of equipment. Utilities data for comparable projects shall be obtained from the records of PHAs, the Utility suppliers or the HUD Field Office. See also § 865.474(b) with respect to scattered site dwelling units.

(c) Source of data for Tenant-Purchased Utilities. In the case of Tenant-Purchased Utilities, the PHA must establish a special procedure for obtaining the consumption data for those dwelling units. The PHA shall utilize

a method which it finds best taking into consideration practicability, reliability, and administrative cost. Such methods may include, for example, arrangements with Utility suppliers to furnish consumption data to the PHA (without identification of the users, if the Suppliers so prefer); meter readings by the PHA; having the tenants furnish copies of their utility bills (or making them available for copying) in connection with the payments of their monthly rents.

24 C.F.R. § 865.477 Standards for allowances for PHA-furnished utilites. (1980)

The Allowances for PHA-Furnished Utilities for each dwelling unit category and unit size shall be established in terms of consumption units, sufficient to meet the requirements of about 90% of the dwelling units in the category. Conversely, the Allowances should be such as are likely to result in surcharges for about 10% of the dwelling units. The basic method of determining the Allowances should be as follows:

(a) The dwelling unit consumption data for all units within each dwelling unit category and unit size should be listed in order from low to high consumption for each billing period.

(b) The PHA should determine whether there are any unusually high instances of consumption which might be due to unusual individual circumstances, wasteful practices, or use of the Utility for tenant-supplied major appliances. The PHA should exclude such cases from consideration in calculating the amount of the allowance.

(c) Where the available data covers two or more years, averages should be computed and adjustments made, if warranted, by reason of abnormal weather conditions or

other changes in circumstances affecting utility consumption.

(d) The Allowances should then be established at the level which can reasonably be expected to meet the requirements of 90% of the dwelling units in the category. 24 C.F.R. § 865.478 Standards for allowances for tenant-purchased utilities. (1980)

In the case of Tenant-Purchased Utilities, the Allowance is provided in terms of a fixed number of dollars made available to each tenant in the dwelling unit category for purposes of paying his or her Utility bills. If a tenant's Utility expense is less than the Allowance, the tenant retains the benefit, while if a tenant's Utility expense is more than the Allowance, the tenant must absorb the excess cost. In these circumstances, in order for the total Utility expense to the PHA for the particular dwelling unit category to be equal to the total of the Utility bills for all the dwelling units in that caetgory, the amount of the Allowance for each dwelling unit must be established at the average amount per dwelling unit. Accordingly, the basic method of determining the Allowance should be as follows:

(a) Proceed as stated in paragraphs (a) through (c) of § 865.477.

(b) Determine the total amount of consumption for each month for all the dwelling units in the category, and divide by the number of dwelling units, in order to obtain the average amount of consumption per dwelling unit for that month.

(c) Apply the current rate structure of the Utility supplier to each month's average amount of consumption

in order to compute the dollar cost of each month's average amount of consumption. The result will be the monthly Allowances for Tenant-Purchased Utilities for the particular Utility and dwelling unit category involved.

24 C.F.R. § 865.479 Surcharge for excess consumption of PHA-furnished utilities. (1980)

PHAs shall include in their rent schedules for dwelling units subject to Allowances for PHA-Furnished Utilities, schedules of Surcharges indicating the additional dollar amounts tenants will be required to pay for Utility consumption in excess of the Allowances. These Surcharge Schedules may show the amounts of Surcharge for specific blocks of excess consumption rather than amounts computed on a straight per-utility-unit basis. The amount of the Surcharge for each block shall be computed by applying the Utility Supplier's average rate to the amount of excess consumption.

24 C.F.R. § 865.480 Review and revision of allowances. (1980)

(a) Revision by Reason of Inadequate Data Base (for PHA-Furnished Utilities). Where the data base for establishment of the Allowance consisted of less than three years for the particular housing, the PHA shall review the Allowances at the end of each year, taking into consideration the data for the particular housing, until an Allowance based on records for three years for the particular housing has been established.

(b) Allowance for PHA-Furnished Utilities. (1) At the end of each quarterly or other billing period, in connection with the determination of surcharges, the PHA

shall determine the number and percentage of tenants who are subject to surcharge. When the PHA finds that the percentage of surcharge cases is more than 25 percent of a category and there is no reason of a non-recurring nature (such as weather extremes) to account for this, the PHA shall review the consumption data and if appropriate, establish a revised Allowance in accordance with § 865.477.

(2) No separate revisions in the allowance by reason of changes in Utility rates are necessary because the PHA is billed directly by the Utility suppliers at their current rates and, by the same token, the PHA uses current rates in computing surcharges.

(c) Allowances for Tenant-Purchased Utilities. (1) Since the tenants in these cases are billed directly by the Utility suppliers at their current rates, the PHA shall monitor the rates on a monthly basis. Whenever there is a rate change which, by itself or together with prior rate changes not adjusted for, results in a change of 10 percent or more, the PHA shall revise the Allowance accordingly.

(2) The average consumption levels on which the Allowances are based shall be reviewed and revised in accordance with § 865.478 in the event of any change in circumstances indicating probability of a significant change in average consumption levels, but in any event once every three years.

(d) Effective Date of Revised Allowances. In order to allow a reasonable time for PHA determination and processing of a revision in Allowances, a revised Allowance shall take effect with the next billing period following compliance with requirements of notice to tenants prescrib [sic] under 24 C.F.R. Part 861.

24 C.F.R. § 865.481 Individual relief. (1980)

(a) Requests for relief from surcharges for excess consumption of PHA-Furnished Utilities or from Utility supplier billings in excess of the Allowances for Tenant-Purchased Utilities may be submitted to the PHA on the following grounds:

(1) The consumption for the billing period is so far out of line with previous billing periods (seasonally adjusted) as to indicate a possible defect in the meter or error in the meter reading.

(2) A defect in the dwelling unit of PHA-Furnished equipment is causing a substantial and abnormal increase in Utility consumption. The term "defect" means a condition which the PHA has a duty to repair, such as windows or doors which do not close in accordance with their original design, broken windows, damaged walls, etc. The term "defect" does not include a deficiency in the original design, such as inadequate insulation by current standards, absence of storm windows, etc.

(3) In the case of Tenant-Purchased Utilities only, that the utility consumption exceeds the applicable Allowance by 20 percent or more for reasons other than wasteful or unauthorized usage.

(b) Requests for relief on the grounds authorized by this section shall be investigated by the PHA, which shall conduct or cause to be conducted, an energy audit of the unit to determine whether excess utility consumption is reasonable, given the characteristics of the specific dwelling unit, and appropriate relief shall be granted in accordance with the findings of the PHA.

(c) Where the PHA finds that excess utility consumption is due to wasteful or unauthorized usage, the PHA shall advise and assist the tenant on methods of reducing the utilities usage. This advice and assistance may include counseling, installation of new energy conserving equipment or appliances and corrective maintenance.

24 C.F.R. § 865.482 Establishment of allowances under §§ 865.470 through 865.481. (1980)

It is recognized that a reasonable time must be allowed for PHAs to assemble the records and data and establish allowances in accordance with the standards and procedures set forth in §§ 865.470 through 865.481, after providing an opportunity for tenant comment as required by § 866.5 of this chapter. Accordingly, PHAs shall proceed to accomplish these results as promptly as possible, but shall establish such allowances effective as of a date no later than 120 days from the effective date of this rule or extended date, if approved by HUD.

24 C.F.R. § 966.4 Lease Requirements (1985)

A lease shall be entered into between the PHA and each tenant of a dwelling unit which shall contain the provisions described hereinafter.

(a) *Identification of parties and premises.* The names of the parties to the leases and the identification of the premises leased shall be set forth, including:

(1) The term of the lease and provisions for renewal, if any;

(2) The members of the household who will reside in the unit.

(b) *Payments due under the lease.* (1) The lease shall state the amount fixed as rent, specifying the utilities and quantities thereof and the services and equipment furnished by the PHA without additional cost.

(2) The lease shall provide for charges to tenants for maintenance and repair beyond normal wear and tear and for consumption of excess utilities. The lease shall state the basis for the determination of such charges (e.g., by a posted schedule of charges for repair, amounts charged for utility consumption in excess of the allowance stated in the lease, etc.). The imposition of charges for consumption of excess utilities is permissible only if such charges are determined by an individual check meter, servicing the leased unit or result from the use of major tenant-supplied appliances.

(3) At the option of the PHA, the lease may provide for:

(i) Payment of penalties for late payments.

(ii) Security deposits which shall not exceed one month's rent or such reasonable fixed amount as may be required by the PHA. Provision may be made for gradual accumulation of the security deposit by the tenant. Subject to applicable laws, interest earned on security deposits may be refunded to the tenant on vacation of the premises or used for tenant services or activities.

(4) The lease shall provide that charges assessed under paragraph (b)(2) of this section shall not become due and collectible before the first day of the second month following the month in which the charge is incurred.

(c) *Rent redeterminations.* The lease shall provide for redetermination of rentals which shall include:

(1) The frequency of regular rental redetermination and the basis for interim redetermination;

(2) An agreement by the tenant to furnish such information and certifications regarding family composition and income as may be necessary for the PHA to make determinations with respect to rent, eligibility, and the appropriateness of dwelling size;

(3) An agreement by the tenant to transfer to an appropriate size dwelling unit based on family composition, upon appropriate notice by the PHA that such a dwelling unit is available.

(d) *Tenant's right to use and occupy.* The lease shall provide that the tenant shall have the right to exclusive use and occupancy of the leased premises which shall include reasonable accommodation of the tenant's guests or visitors and, with the consent of the PHA, may include care of foster children and live-in care of a member of the tenant's family.

(e) *The PHA's obligations:* The lease shall set forth the PHA's obligations under the lease which shall include the following:

(1) To maintain the premises and the project in decent, safe and sanitary condition;

(2) To comply with requirements of applicable building codes, housing codes, and HUD regulations materially affecting health and safety;

(3) To make necessary repairs to the premises;

(4) To keep project buildings, facilities and common areas, not otherwise assigned to the tenant for maintenance and upkeep, in a clean and safe condition;

(5) To maintain in good and safe working order and condition electrical, plumbing, sanitary, heating, ventilating, and other facilities and appliances, including elevators, supplied or required to be supplied by the PHA;

(6) To provide and maintain appropriate receptacles and facilities (except containers for the exclusive use of an individual tenant family) for the deposit of ashes, garbage, rubbish and other waste removed from the premises by the tenant in accordance with paragraph (f)(7) of this section; and

(7) To supply running water and reasonable amounts of hot water and reasonable amounts of heat at appropriate times of the year (according to local custom and usage) except where the building that includes the dwelling unit is not required by law to be equipped for that purpose, or where heat or hot water is generated by an installation within the exclusive control of the tenant and supplied by a direct utility connection.

(f) *Tenant's obligations.* The lease shall provide that the tenant shall be obligated:

(1) Not to assign the lease or to sublease the premises;

(2) Not to provide accommodations for boarders or lodgers;

(3) To use the premises solely as a private dwelling for the tenant and the tenant's household as identified in

the lease, and not to use or permit its use for any other purpose;

(4) To abide by necessary and reasonable regulations promulgated by the PHA for the benefit and well-being of the housing project and the tenants which shall be posted in the project office and incorporated by reference in the lease;

(5) To comply with all obligations imposed upon tenants by applicable provisions of building and housing codes materially affecting health and safety;

(6) To keep the premises and such other areas as may be assigned to him for his exclusive use in a clean and safe condition;

(7) To dispose of all ashes, garbage, rubbish, and other waste from the premises in a sanitary and safe manner;

(8) To use only in a reasonable manner all electrical, plumbing, sanitary, heating, ventilating, air-conditioning and other facilities and appurtenances including elevators;

(9) To refrain from, and to cause his household and guests to refrain from destroying, defacing, damaging, or removing any part of the premises or project;

(10) To pay reasonable charges (other than for wear and tear) for the repair of damages to the premises, project buildings, facilities or common areas caused by the tenant, his household or guests;

(11) To conduct himself and cause other persons who are on the premises with his consent to conduct themselves

in a manner which will not disturb his neighbors' peaceful enjoyment of their accommodations and will be conducive to maintaining the project in a decent, safe and sanitary condition;

(12) To refrain from illegal or other activity which impairs the physical or social environment of the project.

(g) *Tenant maintenance.* The lease may provide that tenants shall perform seasonal maintenance or other maintenance tasks, as specified in the lease, where performance of such tasks by tenants of dwelling units of a similar design and construction is customary: *Provided,* That such provision is included in the lease in good faith and not for the purpose of evading the obligations of the PHA: *And provided further,* That the PHA shall exempt those tenants who are unable to perform such tasks because of age or physical disability.

(h) *Defects hazardous to life, health, or safety.* The lease shall set forth the rights and obligations of the tenant and the PHA in the event that the premises are damaged to the extent that conditions are created which are hazardous to life, health, or safety of the occupants and shall provide that:

(1) The tenant shall immediately notify project management of the damage;

(2) The PHA shall be responsible for repair of the unit within a reasonable time: *Provided,* That if the damage was caused by the tenant, tenant's household or guests, the reasonable cost of the repairs shall be charged to the tenant;

(3) The PHA shall offer standard alternative accommodations, if available, in circumstances where necessary repairs cannot be made within a reasonable time; and

(4) Provisions shall be made for abatement of rent in proportion to the seriousness of the damage and loss in value as a dwelling in the event repairs are not made in accordance with paragraph (h)(2) of this section or alternative accommodations not provided in accordance with paragraph (h)(3) of this section, except that no abatement of rent shall occur if the tenant rejects the alternative accommodation or if the damage was caused by the tenant, tenant's household or guests.

(i) *Pre-occupancy and pre-termination inspections.* The lease shall provide that the PHA and the tenant or his representative shall be obligated to inspect the premises prior to commencement of occupancy by the tenant. The PHA will furnish the tenant with a written statement of the condition of the premises, the dwelling unit, and the equipment provided with the unit. The statement shall be signed by the PHA and the tenant, and a copy of the statement shall be retained by the PHA in the tenant's folder. The PHA shall be further obligated to inspect the unit at the time the tenant vacates the unit and to furnish the tenant a statement of any charges to be made in accordance with paragraph (b) of this section. Provision shall be made for the tenant's participation in the latter inspection, unless the tenant vacates without notice to the PHA.

(j) *Entry of premises during tenancy.* The lease shall set forth the circumstances under which the PHA may enter the premises during the tenant's possession thereof, which shall include that:

(1) The PHA shall, upon reasonable advance notification to the tenant, be permitted to enter the dwelling unit during reasonable hours for the purpose of performing routine inspections and maintenance, for making improvements or repairs, or to show the premises for re-leasing. A written statement specifying the purpose of the PHA entry delivered to the premises at least two days before such entry shall be considered reasonable advance notification;

(2) The PHA may enter the premises at any time without advance notification when there is reasonable cause to believe that an emergency exists; and

(3) In the event that the tenant and all adult members of his household are absent from the premises at the time of entry, the PHA shall leave on the premises a written statement specifying the date, time and purpose of entry prior to leaving the premises.

(k) *Notice procedures.* The lease shall provide procedures to be followed by the PHA and tenants in giving notice one to the other which shall require that:

(1) Except as provided in paragraph (j) of this section notice to the tenant shall be in writing and delivered to the tenant or to an adult member of the tenant's household residing in the dwelling or sent by prepaid first-class mail properly addressed to the tenant; and

(2) Notice to the PHA shall be in writing, delivered to the project office or the PHA central office or sent by prepaid first-class mail, properly addressed.

(l) *Termination of the lease.* The lease shall set forth the procedures to be followed by the PHA and by the tenant in terminating the lease which shall provide:

(1) That the PHA shall not terminate or refuse to renew the lease other than for serious or repeated violation of material terms of the lease such as failure to make payments due under the lease or to fulfill the tenant obligations set forth in § 966.4(f) or for other good cause.

(2) That the PHA shall give written notice of termination of the lease of:

(i) 14 days in the case of failure to pay rent;

(ii) A reasonable time commensurate with the exigencies of the situation in the case of creation or maintenance of a threat to the health or safety of other tenants or PHA employees; and

(iii) 30 days in all other cases.

(3) That the notice of termination to the tenant shall state reasons for the termination, shall inform the tenant of his right to make such reply as he may wish and of his right to request a hearing in accordance with the PHA's grievance procedure.

(m) *Grievance procedures.* The lease shall provide that all disputes concerning the obligations of the tenant or the PHA shall be resolved in accordance with the PHA grievance procedures which shall comply with Subpart B of this part.

(n) *Provision for modifications.* The lease shall provide that modification of the lease must be accomplished by a written rider to the lease executed by both parties, except for paragraph (e) of this section and § 966.5.

(o) *Signature clause.* The lease shall provide a signature clause attesting that the lease has been executed by the parties.

No. 85-5915

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

BRENDA E. WRIGHT, GERALDINE H. BROUGHMAN, and SYLVIA P. CARTER individually and on behalf of all persons similarly situated

Petitioners,

v.

CITY OF ROANOKE REDEVELOPMENT AND HOUSING AUTHORITY

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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PETITIONERS' REPLY BRIEF

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ARGUMENT

The tenant petitioners rely largely on their opening brief (hereafter "Petitioners' brief") to rebut the arguments of the respondent Housing Authority ("Respondent's brief"). Additional rebuttal is offered in this reply brief on six points: (1) the Authority's attempt to dissociate the utility allowance regulations from the Brooke Amendment[1]; (2) the denigration of the utility allowance regulations as less than binding; (3) the attempt to portray the regulations as too vague for judicial enforcement; (4) the offering of illusory remedies as evidence of congressional intent to preclude § 1983 suits; (5) the misuse of *Sea Clammers*[2] to reverse the presumption in favor of the § 1983 remedy; and (6) the implication that *Guardians*[3] precludes a damages remedy for intentional violations of federal law.

Preliminarily it should be noted that the Authority's brief continues to misrepresent the tenant claims as a quest for "free electricity," as if to suggest that tenant petitioners seek a handout rather than something they have paid for. Neither the court of appeals nor the district court accepted this mislabeling of the issue. The electricity allowance is not "free" but is among the benefits the tenants are supposed to receive for their rent, with the balance of costs for utilities (as for other expenses) paid for by HUD's operating subsidies, 24 C.F.R. § 990.107 (1986). The electricity is ultimately "free" only to the Housing Authority, which pays for it with the money of others.

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[1] 42 U.S.C. § 1437a(a) (1981) and predecessor sections.

[2] *Middlesex Cty. Sewerage Auth.* v. *Nat'l Sea Clammers Ass'n*, 453 U.S. 1 (1981).

[3] *Guardians Ass'n* v. *Civil Service Comm'n*, 463 U.S. 582 (1983).

I. THIS COURT SHOULD NOT ACCEPT THE HOUSING AUTHORITY'S INVITATION TO GUT THE BROOKE AMENDMENT BY INDIRECTION.

The respondent Housing Authority takes a dramatically different position on this case from the Fourth Circuit, and for good reason disowns much of the reasoning of the court of appeals. The alternative argument presented is no more compelling, however, and would equally permit evasion of the intent of Congress as expressed in the Brooke Amendment.

The Fourth Circuit's justification for dismissal was not lack of substantial tenant rights (under the test of *Pennhurst*[4]) but rather the erroneous conclusion that a general regulatory power given to HUD adequately evidenced an intention of Congress to preclude *any* private enforcement action by tenants regarding § 1437 public housing rights (JA 37) (under the test of *Sea Clammers*). This leap of inference, of course, would divest all public housing tenants of any meaningful federal rights. By contrast, the Housing Authority concedes that some sections of the United States Housing Act of 1937 ("USHA") may create rights enforceable under 42 U.S.C. § 1983 (Respondent's brief 18, n.11). The Authority even cites the Brooke Amendment as an example of a "clear Congressional mandate" that should be privately enforceable (*id.*, citing *Beckham* v. *New York City Housing Auth.*, 755 F.2d 1074 (2d Cir. 1985) which so held).

Having thus honored the Brooke Amendment, the Authority invites this Court to eviscerate it from another direction: by reducing the content and coverage to a meaningless minimum. The Authority's argument runs that the Brooke Amendment limits rents but does not mention utilities, nor does it expressly define rent to

[4] *Pennhurst State School and Hospital* v. *Halderman*, 451 U.S. 1, 28 (1981).

include them, so Congress must not have contemplated that any utility consumption would be provided in return for the Brooke rentals paid by tenants. The argument would focus on HUD's 1980 utility allowance regulations in isolation, denying any relationship between the admittedly enforceable Brooke Amendment and those supposedly unenforceble regulations (Respondent's brief 22-27).[5] Their wedge is too blunt for the task, for at least three reasons.

First, HUD thinks otherwise. In a brief which is extraordinarily deferential to the administrative agency whose interpretation must be accorded deference, *Udall* v. *Tallman*, 380 U.S. 1, 16-17 (1965), the Authority neglects to recognize that HUD has always considered "rent" to include the charges to tenants for PHA-provided utilities, services and equipment as well as for the roof and four walls.[6] HUD has maintained this position in the face of PHA criticism (*see e.g.* 47 Fed. Reg. 35250 (1982)) and continues to maintain it under present regulations, 24 C.F.R. § 913.102 (1986) (defining "tenant rent").

Second, HUD's inclusion of the cost of utilities within the Brooke limits is completely consistent with what leg-

[5] The Authority relies on *Stone* v. *District of Columbia*, 572 F.Supp. 976 (D.D.C. 1983) for the proposition that "no § 1983 rights accrued to tenants under the interim utility regulations," Respondent's brief, 18 n.11. In fact the district court's opinion does not even mention § 1983, being based entirely on a defective implied rights analysis. The PHA conceded error and settled on appeal, as noted in Petitioners' brief, 15 n.12. The Authority correctly notes a HUD motion to affirm the district court decision. On September 9, 1986, the court of appeals instead vacated the district court opinion and remanded the case with instructions for dismissing the claim against HUD as mooted by payment of the tenant claims; supervision of prompt submission of remaining payment requisitions; and disposition of the claim for attorney fees under 42 U.S.C. § 1988. Judgment and memorandum opinion lodged with the clerk for the convenience of this Court.

[6] See authorities collected in amicus brief of National Housing Law Project, 8-11.

islative history shows about the intent of Congress. The Authority concedes that Congress initially included utilities among the components of rental[7] (Respondent's brief 25). The Authority correctly points out that the original USHA approach did not limit the rent a PHA could charge, or require the inclusion of utility costs within the PHA rent. What the parenthetic language does show, however, is highly germane: a congressional belief that all of a family's shelter costs should be viewed together, and seen in relation to total family income.

The Authority correctly notes that the 1959 amendment to this section removed the parenthetic exegesis on the meaning of rental.[8] There is no reason to view that amendment as intended to change what was covered by "rental." Nor was the lack of an explicit definition in the Brooke Amendment itself proof of intent to change the long standing inclusive meaning of the term. The Authority says (Respondent's brief at 25) that the Brooke Amendment's use of the word "rent" implies "shelter cost or a fee for the possessory use of the land." That begs the question; of course rent is payment connected with use of real estate. But in any rental, the character of the property, the extent and nature of the use, and the equipment and services to be provided in conjunction, are items requiring further specification. "Rent" is what the tenant pays, not what he gets for it. The Brooke Amendment's use of the term in no way requires a change in the range of shelter costs Congress had previously directed to be considered within the statutory meaning of rental.

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[7] USHA, Ch. 896, § 2, 50 Stat. 888 (1937) reads:

> The dwellings in low income housing . . . shall be available solely for families whose net income at the time of admission does not exceed five times the rental (including the value or cost to them of heat, light, water, and cooking fuel). . . .

[8] 42 U.S.C. § 1402(1), as amended by Pub. L. No. 86-372, § 503, 73 Stat. 654 (1959).

The Authority's comparison (Respondent's brief 24-25) of "rent" in assisted housing with "rent" in the Brooke Amendment draws the wrong conclusion. With regard to assisted housing, Congress included a parenthetic definition of monthly maximum rent[9] as including fees for utilities, maintenance and management, 42 U.S.C. § 1437f(c)(1) (1986). With regard to public housing, Congress did not include *any* parenthetic definition of rent, 42 U.S.C. § 1437a(a) (1986). The terms are different (monthly maximum rent versus rent); the purposes are different (one limiting return to a landlord, the other limiting cost to a tenant); the structures are not parallel (one parenthetically elaborating on rent, the other not attempting to do so). Nothing can properly be inferred from the comparison. The maxim *inclusio unius est exclusio alterius* is inappropriate; not *unius* but nothing at all is specified in the Brooke Amendment about what a tenant gets for his payment.

The third reason for linking HUD's utilities regulation with the Brooke Amendment is probably the most compelling, though not even addressed by the Authority. The Brooke Amendment would be virtually useless unless it controlled not only shelter charges, but ancillary service charges as well. The purpose of the Brooke Amendment, after all, was to make it possible for very poor people to "spend no more than 25% of their income for housing,"[10] leaving the very modest remainder free for other basic subsistence (Petitioners' brief at 18-23). This purpose is wholly thwarted when a PHA imposes unavoidable charges for necessary services associated with the physical dwelling. A HUD policy which did not require all

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[9] This is *not* generally the amount payable by the tenant, but rather the total of tenant payment plus applicable subsidy.

[10] Senator Brooke, floor statement on S. 2864, 115 CONG. REC. 26721 (1969).

essential services to be provided within the Brooke rent ceiling would itself contravene the congressional purpose. Here the regulations are an integral part of the statute, and both sources of authority together define the substantive rights of tenants.

The Authority asks this Court to pretend no such connection between rental limits and utility costs. if the invitation is accepted, the next PHA will suggest that charges for essential equipment are not limited by the Brooke Amendment, and then charges for normal building maintenance, and then for project administration, and so on until the Brooke limits become an irrelevant relic. Neither HUD nor the Fourth Circuit have read the statute that narrowly, and neither should this Court.

II. THE HUD UTILITY ALLOWANCE REGULATIONS ARE NOT JUST "PART OF THE GIVE AND TAKE OF THE REGULATORY DIALOGUE," BUT ARE THE LAW.

While never questioning the validity or applicability of the HUD utility allowance regulations which it defied, the Authority argues that courts should not take such regulations seriously. The regulations were only an interim rule (Respondent's brief at 12). The regulations were criticized (brief at 19-21).[11] HUD soon proposed revisions for public

[11] Worthy of special note is the Authority's criticism that the allowance regulations do not encourage conservation because they are based on a past pattern of actual [read wasteful] consumption rather than an energy conscious standard (Respondent's brief at 4-5, 19). In fact the consumption data on which the Authority would have drawn (had it bothered to comply with the regulations) reflected prior actual consumption under a draconian surcharge system, where almost every tenant consumed under the disincentive of extra utility charges every quarter (see facts in brief for Petitioners at 5, 6-7). If charges to tenants are an effective means of encouraging energy conservation, then the consumption base data available to this Authority was already very energy-conservative. In any event HUD's subsequent utility allowance regulations *also* permit a PHA to base allowances on past consumption. 24 C.F.R. § 965.476(c)(i) (1986).

comments (brief at 20). HUD has discretion in the rulemaking and oversight process (brief at 21-22). "Where interim rules are at issue, there exists a danger that courts may enforce literally that which the agency intends to be part of the give-and-take of the rulemaking process" (*id.*) HUD's authority would be severely undermined if tenants could actually hold local housing officials to what HUD has promulgated (brief at 15).

The Authority's characterization is only slightly more extreme than that of the court of appeals itself, which speculated that Congress may have given HUD sole enforcement authority so that it could decide which violations of USHA to disregard. (Opinion, JA 36, n.7). Having created clear regulations describing what local authorities must do to comply with the mandate of Congress, HUD may neglect compliance, and in fact is to be expected to do so in order that the agency can thereby concentrate on more important matters.

This view of the Code of Federal Regulations and the unlimited discretion of HUD is a radical departure, which goes far beyond a recognizable counsel of judicial restraint. This case is not about HUD's enforcement discretion (the tenants never put much hope in that quarter), but rather is about whether HUD's regulations have any binding effect. Law is law, and not just the parts we like. The HUD utilities allowance regulations were the law, *see Thorpe* v. *Housing Auth.*, 393 U.S. 268, 274-76 (1969), and bound not only housing authorities and tenants but also HUD as promulgating agency, *see Service* v. *Dulles*, 354 U.S. 363 (1957). The regulations may have provoked controversy and criticism, but HUD nonetheless set an implementation deadline (24 C.F.R. § 865.482 (1983)) and chose to leave the regulations in effect for four years. At any time HUD could have utilized its reserved authority under 24 C.F.R. § 999.101 (1986) and its predecessors to waive compliance with the utility regulations if they

proved too cumbersome or flawed, in the specific case or generally. HUD did not choose to waive compliance either with regard to this Housing Authority or any other, but left the utilities regulations in full force until the latest revision superceded them, 49 Fed. Reg. 31399 (1984).

It should come as no surprise that a blatant violator of regulations should have a low opinion of the regulations violated; but it is surprising that the Authority would expect the courts to find them less than binding. The position urged by the Authority feigns deference to HUD, but would in fact destroy HUD's regulatory authority. If an agency cannot speak conclusively through its duly-promulgated legislative regulations, then it cannot mandate standards, define procedure, or compel adherence. The Authority would seize upon HUD's present tendency to regulatory anarchy (see Petitioners' brief at 40-42; amicus brief of National Housing Law Project at 41-54) and enshrine it as the law of the land. That would be no service to HUD or Congress, nor ultimately to housing authorities themselves.

III. THE HUD UTILITY REGULATIONS ARE QUITE SPECIFIC ON THE FORMULATION OF ALLOWANCES, AND THE AUTHORITY'S ALLEGED DIFFICULTIES IN COMPLIANCE ARE MERELY SPECULATIVE.

The Housing Authority argues (Respondent's brief at 15-17) that the procedure and standards in HUD's 1980 utility allowance regulations are too vague to establish rights or be enforced by a court. This Authority, on these facts, could hardly be in a worse posture to make the argument, even if it were plausible.

First, as to procedure: nothing could be more routine in court review of agency compliance than determining whether certain mandated procedural steps were followed.[12] The HUD utility allowance regulations have many familiar procedural features: collection of data from specified sources (24 C.F.R. § 865.476 (1983)); determination by a prescribed formula (§ 865.477(a) through (d)); notice to tenants with an opportunity to comment (§ 865.473(a)); submission to the regulatory authority (§ 865.473(a); publication of the allowances as part of rent schedules (§ 865.479); periodic review and revision (§ 865.480). It takes no technocrat to decide whether these basic steps have been followed. Since the Housing Authority undertook *none* of these mandated steps (see Petitioners' brief at 4-5), its protest of their immense difficulty must be taken with some scepticism.

Nor are the substantive standards imposed for calculations of allowances so esoteric and discretion-ridden as to defy judicial review. There are four prescribed steps in the calculation required by 24 C.F.R. § 865.477 (1983). First, consumption data for each size apartment is listed in order, lowest to highest. No discretion at all there.[13] Second, the PHA is to exclude unusually high consumption figures which would skew the computation. Some discretion there, but only at the margin. Third, if the data covers a multi-year period, then it is to be averaged (no discretion) and adjustment made for abnormal weather (again a very modest discretion). Finally, allowances are fixed at the level which "can reasonably be expected to meet the requirements of 90% of the dwelling units in the category." Once the preceding steps have been completed, there is virtually no room for discretion in this final stage.

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[12] *See e.g.* Administrative Procedure Act, 5 U.S.C. § 706(2)(D).

[13] Review of this stage, the Authority complains, "would necessitate examination of the personal consumption habits of 1,100 households" (Respondents brief at 17). This spector of onerous, privacy-invading data collection is actually a mechanical listing function performed from existing consumption records.

The required calculation is based on *retrospective* data; the goal is an allowance adequate *prospectively* for 90% of the units. The method can necessarily be more precise than the result as applied: this explains the use of "about 90%" rather than "exactly 90%" in § 865.477's statement of the goal of the allowances. A precise outside parameter for error is established by § 865.480(b)'s requirement for review if more than 25% of units in a category are charged in a quarter.

Of course, there is some discretionary PHA input under the utility allowance regulations: such factors as local weather and wasteful tenant consumption will obviously vary from project to project. Variable inputs do not in themselves render a mandatory formula unenforceable, nor so obscure as to require vast technical competence. The local variables are not the essence of some "coherent national housing policy" as the Authority curiously implies (Respondent's brief at 15); the utility allowance regulations *are* the national housing policy, and the local variables but a modest concession to make the national policy feasible. And again, the Authority's argument that this standard is beset with discretionary loopholes is completely without basis in the record. All we know of the Authority's effort is that there was not one. This suit does not attack an abuse of discretion, but the failure to perform a mandatory duty.

Finally, the Authority's argument on this point characatures the division between judicial and regulatory competence. There is no regulation that does not presume some variable input, and courts can afford some deference to an administering agency's expertise and experience without abdicating the judicial duty to uphold the law.[14]

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[14] *See e.g. Motor Vehicle Mfrs. Ass'n* v. *State Farm Mutual Auto Ins. Co.*, 463 U.S. 29 (1983); *NLRB* v. *Brown*, 380 U.S. 278, 291 (1965) (reviewing courts must not "rubber stamp . . . administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute").

Here the HUD utility allowance regulations afford a perfectly adequate standard against which to measure the compliance not just of this Housing Authority, but even of a PHA which actually sought to comply.

IV. THE MAJOR COMPONENTS OF THE "COMPREHENSIVE ENFORCEMENT SCHEME" RELIED UPON BY THE AUTHORITY ARE ILLUSORY.

In its brief at 28-32, the Housing Authority tries to construct a "comprehensive enforcement scheme" to meet the test of *Sea Clammers* for § 1983 preclusion. This effort is essential to its cause because the Fourth Circuit opinion does not ever examine that standard with regard to the Brooke Amendment. By contrast, the Second Circuit in *Beckham* v. *New York City Housing Auth.*, 755 F.2d at 1077, specifically held that § 1983 was not precluded for enforcement of Brooke because the Brooke Amendment "contains no comprehensive enforcement mechanism to enforce statutory rent limitations."

To overcome *Beckham*, the Authority must show, not only some generalized administrative power, but remedies specifically appropriate for Brooke violations. The Authority has failed to do so. Instead of showing that *Congress* has erected appropriate remedies, the Authority attempts (Respondent's brief 28-30) to patch together various *HUD* measures into a remedial scheme. And the key offerings which might bear some relation to congressional intent—the power of HUD to withhold funds and the tenant grievance mechanism—do not withstand scrutiny as remedies for Brooke violations.

The Authority argues (Respondent's brief at 29) that although Congress has denied HUD the remedy of withholding federal funds pledged as security for *construction* bonds, HUD can terminate *operating* funds to get a PHA's attention. That is not the method of Congress or

the policy of HUD. In its authorization for payment of operating subsidies to PHAs, Congress specified in 42 U.S.C. § 1437g(a)(1):

> The Secretary shall embody the provisions for such annual contributions in a contract *guaranteeing their payment subject to the availability of funds*. . . .[emphasis added]

"Guaranteeing" obviously adds a mandatory quality to the granting of funds on an annual basis. The only specified justification for failure to continue the subsidies is lack of HUD funds—a failure of Congress itself to appropriate adequate sums. This is a context where *inclusio unius est exclusio alterius* does properly apply. When Congress specified a single condition for terminating operating funds, it rejected all others.

HUD has established the "standards for costs . . . and projections" to calculate operating subsidies, as required by § 1437g(a)(1), in its regulations on the Performance Funding System.[15] In those regulations HUD reserved to itself the authority to withhold or reduce operating subsidies in the event of "insufficient funds" (24 C.F.R. § 990.113(c)) and in only two other circumstances: (1) where a PHA fails to adhere to the statutory requirement that aggregate rentals shall not be less than one-fifth of all income of all the resident families (24 C.F.R. § 990.114); and (2) where a PHA fails to conduct required reexaminations of family income (24 C.F.R. § 990.115).[16] HUD did not reserve the authority to terminate or withhold for Brooke violations or any other PHA transgressions.

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[15] First established in 1976 and presently designated as 24 C.F.R. § 990.101 through § 990.120 (1986), the same "PFS" regulations were effective all during the period here in question.

[16] Presumably HUD believed these conditions were justified as definitional aspects of "such annual contributions" under 42 U.S.C. § 1437g(a)(1).

HUD's limited view of its withholding power is explained in a 1981 policy directive to HUD regional staff. In HUD Notice H-81-60, "PHA Compliance with HUD Requirements, Housing Management Operations, Low Income Public Housing Program," issued 10/26/81,[17] HUD explained (at p. 8):

> There are both operational and legal reasons why payment of operating subsidies should *not* be withheld or reduced to enforce compliance with HUD requirements other than those specifically mentioned in the PFS regulations.
>
> Operationally, the problem is that a reduction of operating subsidy payments generally would have an immediate impact upon a PHA's capacity to provide services to its residents that are necesary to maintain the required decent, safe and sanitary standard. From a legal viewpoint, the General Counsel has determined that, although there is no statutory obstacle to doing so, HUD has not established the contractual and regulatory background needed for imposition of this sanction.

While it is far from clear why HUD's General Counsel found § 1437g(a)(1)'s contractual gurantee "no statutory obstacle," the directive's message is clear: HUD itself does not view termination of federal funds as an available remedy for PHA violations of the sort involved here.[18]

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[17] Relevant portions have been deposited with the Clerk for the convenience of the Court. This directive bore an automatic sunset date of 4/30/82 but is believed to represent the continuing policy of HUD and is entirely consistent with HUD's litigation position in Brooke Amendment cases. See Petitioners' brief at 41.

[18] HUD's contractual authority to freeze PHA bank deposits, Annual Contributions Contract § 401(F)(R30), is not proof of the contrary. The deposits which can be frozen are not just federal contributions but *all* PHA funds, § 401(B). This power is a necessary ancillary to HUD's rarely-used right to take possession of and operate a housing project in the event of substantial default by a PHA, §§ 501, 505.

Whatever the shortcomings of the HUD notice, it does show an appropriate sensitivity to a recurring concern of this Court about excluding private remedies in grant programs: the devastating effect of funding cutoffs on the end beneficiaries. As Justice White noted in dissent in *Pennhurst*, 451 U.S. at 52:

> This Court is "most reluctant to assume Congress has closed the avenue of effective judicial review to those individuals most directly affected by the administration of its program[s]" even if the agency has the statutory power to cut off federal funds for noncompliance. *Rosado* v. *Wyman*, 397 U.S. 397, 420 (1970). In part, this reluctance is founded on the perception that a funds cutoff is a drastic remedy with injurious consequences to the supposed beneficiaries of the Act.

In this case cutoff of PHA operating funds would be especially counterproductive: Congress established the federal operating subsidy specifically to make the Brooke Amendment's rent limits feasible! It would not only deny the statutory language, but utterly confound the specific statutory purpose, to credit the cutoff remedy postulated by the Authority and the Fourth Circuit.

The Authority's argument for the tenant administrative grievance mechanism (Respondent's brief at 31) has been largely anticipated (Petitioners' brief at 36-37). Since the filing of the tenants' brief, HUD has once again disowned the Authority's position.[19]

In response to Congress' 1983 statutory mandate for grievance hearings, 42 U.S.C. § 1437d(k) (1986), HUD

[19] And that of the Eleventh Circuit in *Brown* v. *Housing Auth.*, 784 F.2d 1533 (1986). Two of that panel thought the grievance mechanism would be available to complain of allowances, 1537-8 at n.5. The dissenting judge found this to be inadequate evidence of congressional intent to preclude, 784 F.2d at 1542. The majority opinion otherwise simply adopts the Fourth Circuit's flawed reasoning in this case.

recently published revised hearing regulations for comment. 51 Fed. Reg. 26504 (1986). The Authority read the legislative history of the grievance provision as contemplating a broad coverage of "all disputes" between the PHA and tenant; HUD specifically rejects that interpretation, 51 Fed. Reg. 26516, because it relates to an earlier version of the measure, not that which finally passed. The HUD proposal restricts the mechanism to review of "proposed PHA adverse action," § 966.30, 51 Fed. Reg. 26528, and explains:

> PHA action or non-action concerning general policy issues or class grievances (including determination of the PHA's schedule of allowance for PHA furnished utilities . . .) does not constitute adverse action by the PHA, and the PHA is not required to provide the opportunity for a hearing to consider such issues or grievances.

§ 966.31(a)(2), 51 Fed. Reg. 26528. In short, the grievance mechanism affords no remedy—class or individual—for Brooke violations such as these. The Authority's position is again opposite to that of the administering agency to whom it urges deference.

For these reasons and those previously urged, there is no merit in the argument that Congress created a "comprehensive enforcement scheme" which precludes the § 1983 remedy.

V. WHILE CONCEDING THE PRESUMPTION THAT A § 1983 ACTION IS NOT PRECLUDED, THE HOUSING AUTHORITY URGES A STANDARD THAT WOULD REVERSE THE PRESUMPTION AND RENDER § 1983 REDUNDANT.

In its haste to avoid § 1983 the Authority quite disregards the facts and actual holding of this Court in the *Sea Clammers* decision which elaborated the § 1983 preclusion rationale. Faced with the possibility of both an

implied and a § 1983 remedy, the Court in that case did *not* use the same framework of analysis for the two approaches. Justice Powell's opinion for the Court recognizes (453 U.S. at 19) the preferred standing of § 1983's express congressional authorization to sue, and found evidence of congressional intent to override § 1983 sufficient only because Congress "created so many specific statutory remedies including the two citizen-suit provisions." 453 U.S. at 20. This case is at the far extreme—*no* authority for citizen suits, and *no* statutory remedies other than a generalized regulatory authority of HUD which cannot be triggered by tenants. (Petitioner's brief at 35-42). It is not *Sea Clammers* itself which has made § 1983 litigation so confusing but the eager overreading of the decision by public defendants and now, regretably, courts such as the Fourth Circuit. That malady can be corrected without the major transplantation surgery advocated by the Authority; recognition of the presumption that operates in favor of § 1983 should restore that remedy to health.

The Authority's brief (at 32) concedes the presumption that § 1983 is available for private enforcement of federal statutory rights. Like the lower courts, however, the Authority ends up essentially merging the § 1983 and implied right of action tests, *Cort* v. *Ash*, 422 U.S. 66 (1975), which has the effect of nullifying or even reversing the presumption. This approach renders § 1983 redundant, even in its special context of actions against state and local officials, and implicitly overrules *Maine* v. *Thiboutot*, 448 U.S. 1 (1980). The merger approach has never been endorsed by this Court, and is rejected even by the commentary which the Authority cites for it.[20]

[20] Respondent's brief at 36 claims support for use of the *Cort* v. *Ash* tests in the § 1983 context from Brown, "Whither *Thiboutot*? Section 1983, Private Enforcement, and the Damages Dilemma," 33 DEPAUL L. REV. 31, 57-58 (1983). But Professor Brown, though a harsh critic of *Thiboutot*, ultimately rejects the merger of the *Cort* v. *Ash* and § 1983 tests (at 63-64) in favor of a narrowing interpretation of "and laws" (at 64-66) which was specifically rejected in *Thiboutot*.

A proper use of the presumption creates a burden of proof on the defendant to show just what *Sea Clammers* called for—explicit proof of Congressional intent to preclude, generally demonstrated from the remedies and enforcement mechanisms in the statute. The presumption is overcome, of course, if the statute contains an express bar, or as in *Sea Clammers*, if the remedial devices expressly provided are sufficiently comprehensive. The mere existence of some remedy, of some general administration responsibility (as here), or congressional silence simply cannot carry the day against § 1983's express authority to sue. In the implied rights context a defendant does not carry the burden; if congressional intent remains ambiguous, the proponent loses.

Upon the evidence of congressional intent in this case, the tenants should have a right to sue under any reasonable test the court may apply or adopt. But the implied right tests, and indeed the entire discussion of *Cort* v. *Ash*, should have been superfluous here; an implied right of action was never urged by the tenants. In a suit on federal law against a local governmental defendant, § 1983 should always be an easier route[21]; that is the meaning of *Thiboutot*, and it bears repeating to the Fourth Circuit.

VI. THE *GUARDIANS* CONSIDERATIONS FOR § 1983 DAMAGES DO NOT APPLY TO INTENTIONAL AND PERSISTENT VIOLATION OF A FEDERAL LAW WHICH GRANTS SPECIFIC RIGHTS TO BENEFICIARIES.

The Authority would deny the restitution of tenant surcharge payments in this case upon the conclusion of

[21] *Cf. Pennhurst*, Justice White's opinion, 451 U.S. at 51 (in wake of *Thiboutot*, all parties agreed that the implied rights decision below should be considered on § 1983 grounds on appeal).

Justice White's opinion in *Guardians* that damage awards are not available to redress unintentional discrimination in employment under Title VI, 463 U.S. at 596. By its own terms the *Guardians* rationale is inapplicable here. The tenants have already pointed out (Petitioners' brief at 42-43) that the Authority's violations here were indisputably intentional; that the restitution sought is neither federal nor state money but tenant money; and that the funds are readily available to the Authority from its escrow or by adjustment of its HUD contributions.

The public housing program at issue here bears other notable distinctions from ordinary federal-state grant programs. Since there is no local or state government money in the program, those governments will not face the sudden imposition of tax burden that was a concern in *Guardians*. A reallocation of additional federal dollars on account of this suit would not frustrate, but merely achieve, the purposes of USHA generally and the Brooke Amendment specifically.[22] Nor is there in USHA any alternative private remedy, like the private suit for enforcement of Title VI in *Guardians*; here the § 1983 claim is not a tag-along or parallel to a statutory remedy, but the most direct source of relief.

Justice White's exclusion of intentional violations from the reasoning of his *Guardians* opinion is entirely consistent. Intentional decision presumes that the public agency was fully aware of the governing condition which it chose to disregard (as was the Authority here, Petitioner's brief, 4); it is not suddenly being faced with some

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[22] Worth noting is that HUD has not recently experienced a shortage of operating subsidy funds, but rather a recurring surplus. U.S. Dept. of HUD, Fiscal Year 1987 Budget (Feb. 1986), PH-7 (carryover from 1986 estimated at $61.3 million after Gramm-Rudman sequestration); FY 1986 Budget (Feb. 1985), PH-7 ($253 million carryover); FY 1985 Budget (Feb. 1984), PH-7 ($355 million carryover); FY 1984 Budget (Jan. 1983), H-27 ($196 million carryover for FY 1983, $597 million for FY 1982).

ex post facto requirement which might have caused it to reject federal funds. Similarly, a public agency which deliberately disregards federal law cannot claim surprise that there are financial consequences of that decision. Presumably it weighed the risks before stepping over the line. Thus there is no derrogation of the state or local option to choose participation in a spending power grant program.

Finally, attention must be paid to a distinction drawn by Justice White in his *Pennhurst* opinion, 451 U.S. at 53, between a grant recipient's rights to terminate future obligations by withdrawing from the program, and the need to honor those statutory obligations "already accrued." Here and in most damage claims, past noncompliance is not cured by withdrawal. A damage remedy in appropriate circumstances recognizes that distinction.

The damages sought in this case are not some ephemeral measure of the value of an abstract right, *Memphis Community School Dis.* v. *Stachura*, 477 U.S. ___, 54 U.S.L.W. 4771 (1986), or a merely procedural deprivation causing no actual loss, *Carey* v. *Piphus*, 435 U.S. 247 (1978). The damages sought here are compensatory special damages in the most narrow sense. What the tenants lost was their own hard cash, extracted illegally from very meager incomes under explicit or implicit threat of eviction from public housing. The Housing Authority continued to collect the surcharges long after the claim of their illegality, and agreed to an internal escrow of at least a part of the funds collected (R33). Basic fairness here supports the recovery of those funds by the damage remedy generally available under § 1983.

CONCLUSION

The Housing Authority's highly technical defenses to this action studiously disregard the compelling summary judgment record on the central and undisputed fact: a public authority chose to run its public housing in deliberate disregard of statutory, regulatory and leasehold imperatives, so that it could extract more money from its tenants than Congress and HUD wanted them to pay. Nobody was hurt except the tenants, and the foundation principle that public institutions should not be above the law. Evidently nobody seeks to redress either loss except these tenants. The defiance of federal law here is as deliberate, as clear, as specific, and as persistent as any court is likely to find, making this a quintessential case for application of the § 1983 remedy. If § 1983 fails here, it falters everywhere; and with it, in Justice Blackmun's words,[23] "the commitment of our society to be governed by law and to protect the rights of those without power against oppression at the hands of the powerful." This Court must assure that does not occur.

Respectfully submitted,

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[23] Blackmun, "Section 1983 and Federal Protection of Individual Rights," 60 N.Y.U.L. REV. 1, 28 (1985).

No. 85-5915

IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1985

BRENDA E. WRIGHT, et al.,

Petitioners,

V.

CITY OF ROANOKE REDEVELOPMENT
AND HOUSING AUTHORITY

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

BRIEF FOR AMICUS CURIAE NATIONAL HOUSING LAW PROJECT IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE

Since 1968 the National Housing Law Project, a California non-profit corporation, has been a federally funded Legal Services support center which aids attorneys throughout the country who represent low-income clients with housing problems. In the course of its 18-year existence, the Project has developed broad and detailed knowledge of poor people's housing problems, of the history, purpose and intricacies of the federal housing laws, and of the mechanisms needed to ensure that those laws are carried out. In this case, the Project's interest is in ensuring that the Court is as fully informed as possible about the background of the federal housing laws and that the federal courts remain available to enforce those laws. This brief is filed with the consent of all parties.

SUMMARY OF THE ARGUMENT

Plaintiff public housing tenants sued in federal court for return of utility surcharges wrongfully extracted from them by their federally subsidized public housing agency. Amicus Curiae will limit its argument to three points. First, federal law grants plaintiffs a right to pay only 30 percent of their incomes for housing, including reasonable use of utilities. This right is guaranteed by mandatory provisions of federal statutory and regulatory law, which were enacted specifically to protect the tenants' interest in paying affordable rents. These laws contain sufficiently specific standards for judicial enforcement.

Second, Congress has manifested no intention, either expressly or implicitly, to prevent the courts from enforcing these rights under 42 U.S.C. § 1983.

Congress has not chosen to rely upon United States Department of Housing and Urban Development (HUD) as the exclusive enforcer of these federal laws.

Third, an order requiring the public housing authority to return the illegal overcharges is an appropriate remedy. Plaintiffs are merely seeking the return of their own money taken from them by defendant in deliberate disregard of clearly prescribed federal laws. Thus, the decision below, which rests upon unrealistic and unsupported assumptions about HUD's enforcement function, must be reversed. To do otherwise would severely undermine the effectiveness of Section 1983 which this Court has previously struggled to preserve, would do violence to Congress' intent to guarantee affordable rent levels to public housing tenants and would offend the most fundamental notions of fairness.

ARGUMENT

I. PLAINTIFFS HAVE A RIGHT SECURED BY FEDERAL LAW TO PAY NO MORE THAN THIRTY PERCENT OF THEIR INCOMES FOR SHELTER AND REASONABLE USE OF UTILITIES

Under 42 U.S.C. § 1983, plaintiffs must be seeking redress of rights secured by federal law. 42 U.S.C. § 1983; Maine v. Thiboutot, 448 U.S. 1 (1980); Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 28 (1981). Plaintiffs have such federal rights.

In 1969 when Congress enacted the Brooke Amendment, it reversed a long-standing policy granting local housing authorities wide discretion in setting their rents. By the Brooke Amendment, Congress decreed that tenants should pay no more than one-fourth of their incomes for rent. Relying upon the definition of rent that had been included in the original U.S. Housing Act, as well as the specific legislative history of the 1969

Amendment, HUD immediately interpreted the statute to mean that tenants could not be charged more than one-fourth of their incomes for shelter and reasonable use of utilities. HUD has followed that interpretation consistently. As early as 1963, HUD had established guidelines for the public housing agencies (PHAs) for determining when utility use is reasonable. In 1980 HUD formalized those standards in mandatory regulations. In disregard of those laws, the Roanoke PHA charged its tenants extra for use of utilities which they have a right to use without incurring any surcharges.

The statutory and regulatory laws upon which plaintiffs rely create rights for plaintiffs. Those provisions of federal law are mandatory. They were enacted solely to protect the tenants' interests. They provide sufficiently specific standards for measuring reason-

able utility use to which the tenants are entitled. Thus, the statutory and regulatory provisions upon which plaintiffs rely have the obligatory nature, the quality of specificity, and the purpose of protecting the plaintiffs' interests which "right creating" laws must have.

A. Payment of the Statutorily Prescribed Rent Grants Plaintiffs a Right Not Only To Live In Their Rented Homes But Also To Use the Utilities As Well, As Long As Their Use Is Not Excessive

The right created by the statute and its implementing regulations includes the right not to be surcharged for reasonable use of utilities. Although the term "rent" is not currently defined in the U.S. Housing Act itself, the original Act expressly stated that rent should include reasonable utilities. Pub. L. No. 75-412, § 2(1), 50 Stat. 888 (1937). That provision set income limits for

for applicants at five times the annual rental, and specified that annual rental included "the value or cost to them of heat, light, water and cooking fuel." Id.[1] The principle established by that provision, that rent entitles tenants to use a reasonable amount of utilities, has always governed the program's operation and was specifically included in the 1963 LOCAL HOUSING AUTHORITY MANAGEMENT GUIDE. 45 Fed. Reg. 59,502 (1980).

When Congress passed the Brooke Amendment, it was legislating against this background in which public housing rents included reasonable utility usage. In fact, the version of the Brooke Amendment reported out by the Senate Committee specified that rental means total shelter cost, "including any

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1. Pub. L. No. 81-171, § 306, 63 Stat. 429 (1949) expanded the definition to "water, electricity, gas, other heating and cooking fuels, and other utilities."

separate charges to a tenant for reasonable utility use and for public services and facilities."[2] Although the Conference substitute for the Senate bill did not include the specific definition of rental which had been in the Senate bill, that alteration reflected not a change in substance but merely an effort to simplify and shorten the relevant statutory language. As the Conference Report indicates, "the Conference substitute retains the basic concept of Section 211 of the Senate bill by generally limiting rents that may be charged public housing tenants to no more than 25 percent of their income." CONF. REP. 740, 91st Cong., 1st Sess. 30 (1969).

Immediately after the bill was enacted, HUD published a Circular specifically interpreting the statutory term

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2. S. 2864, § 211, 115 CONG. REC. 26,726 (1969); see S. REP. NO. 392, 91st Cong., 1st Sess. 46 (1969).

"rent" to include payment for the use of a reasonable amount of utilities.[3] That Circular applied the 25 percent of income limit to gross rent. Using the language from the original U.S. Housing Act almost verbatim, it defined gross rent as contract rent plus "the value or cost to the tenant for reasonable amounts of utilities" they had to purchase. It defined contract rent as the rent charged for the use of the dwelling and utilities supplied by the PHA. It defined utilities as "water, electricity, gas, other heating, refrigeration and cooking fuels, and other utilities." Id. at 4.

One month later HUD also explained that tenants who pay for their own utilities should get rent credits or cash payments if their reasonable utility costs

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3. HUD Circular, "Implementation of Sections 212 and 213 of the Housing and Urban Development Act of 1969," RHM 7465.1 and RHM 7475.1 (Mar. 16, 1970) (hereinafter HUD's March 16, 1970 Circular.)

exceed the rent limitation. HUD explained that "such adjustment is required to ensure compliance with the 25 percent limitation on gross rents and to ensure equitable treatment as between tenants who supply all or certain of their utilities and those for whom all utilities are supplied by the LHA."[4] This contemporaneous interpretation of the statutory language by the agency charged with its implementation is entitled to great deference. Udall v. Tallman, 380 U.S. 1, 16-17 (1965).

In addition, HUD has without exception adhered to that interpretation ever since 1970.[5] In fact, in explaining why

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4. HUD Circular, "Rent Adjustments Required By Section 213 of the Housing and Urban Development Act of 1969," RHM 7465.3 (Apr. 24, 1970), App. 1, p. 3 (hereinafter April 24, 1970 Circular).

5. See 24 C.F.R. § 913.102 (1985) (definition of "tenant rent"); 24 C.F.R. § 965.470 (1985); former 24 C.F.R. § 865.470, 45 Fed. Reg. 59,505 (1980); former 24 C.F.R. § 860.403(a), (i) and (p), 40 Fed. Reg. 44,324 (1975) (definitions of contract rent, gross rent and utilities).

it was rejecting a proposal that Brooke Amendment rent should not include payment for utilities, HUD explained:

> the Department historically has considered "rent" under the public housing program to include both shelter cost and a reasonable amount for utilities. . . . The general standard of 'reasonable amounts of utilities' predated the Brooke Amendment and has not been questioned subsequently.

47 Fed. Reg. 35,250 (1982). See 49 Fed. Reg. 21,483 (1984).

B. The Statutory and Regulatory Provisions in Question Are Mandatory

For federal laws to secure a right within the meaning of Section 1983, they must impose mandatory obligations. Pennhurst State School and Hospital v. Halderman, 451 U.S 1, 28 (1981). The Brooke Amendment and its implementing regulations have that obligatory quality. Congress has established numerous goals for the federal housing programs, as it

did with the disabled persons Bill of Rights at issue in Pennhurst. See, e.g. 42 U.S.C. § 1437 (1982); 42 U.S.C. § 1441 (1982). Possibly, those policy declarations by themselves do not create rights protected by federal law within the meaning of Section 1983.[6] However, those general policies and goals are not at issue in this case. The rights plaintiffs seek to enforce here are protected by Section 3 of the U. S. Housing Act, an operative provision of the legislation that creates mandatory obligations.

The mandatory nature of this statute is revealed first by the statutory language. Section 3 of the Act now provides:

> A family shall pay as rent for a dwelling unit assisted under this Act the highest of the following amounts, rounded to the nearest dollar:

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6. See, e.g., Perry v. Housing Authority of Charleston, 664 F.2d 1210 (4th Cir. 1981); but see Commonwealth of Pennsylvania v. Lynn, 501 F.2d 848, 855 (D.C. Cir. 1974).

> (1) 30 percent of the family's monthly adjusted income;
>
> (2) 10 percent of the family's monthly income; or
>
> (3) If the family is receiving payments for welfare assistance from a public agency and a part of such payments, adjusted in accordance with the family's actual housing cost, is specifically designated by such agency to meet the family's housing costs, the portion of such payments which is so designated.

42 U.S.C. § 1437a(a) (1982). The first indication of the mandatory nature of this statutory provision is Congress' use of the word "shall," which leaves no discretion with the family to pay less or with the PHA to charge more.

A review of the changes in the rent limitation provision since 1969 confirms its mandatory nature. The 1969 amendment directed that rents "may not exceed one-fourth of the family's income, as defined by the Secretary." Pub. L. No. 91-152,

§ 213, 83 Stat. 389 (1969). That language granted the housing authority discretion to fix the rent as long as the amount chosen did not exceed the federal maximum. When the Act was revised extensively in 1974, the language was changed to read "the rental for any dwelling unit shall not exceed one-fourth of the family's income as defined by the Secretary." Pub. L. No. 93-383, § 201, 88 Stat. 653 (1974). If there was any ambiguity about the word "may" in the 1969 amendment, it was eliminated by Congress' use of "shall" in 1974.

In 1981 Congress adopted the current version of the rent limitation quoted above. In doing so, Congress eliminated the PHAs' previous discretion to charge less than the federally prescribed maximum. Because Congress has now set the exact rents itself, the statute no longer needs to be phrased as a limit

which the local PHA shall not exceed and it is not so phrased. Nonetheless, when viewed in this historical context, the present statutory language clearly creates not only a tenant duty to pay a specified amount of rent but also a mandatory PHA duty not to charge more.

An historical review of the PHA's changing role in the rent-setting process also demonstrates that these statutory provisions are mandatory and the PHAs have no discretion to disregard them. The original design of the Act was to provide federal assistance for the capital costs of developing housing projects. All other costs, including operating costs, were to be covered by rents. Public housing agencies were given full autonomy in setting their rents. Pub. L. No. 75-412, §§ 10(b) and 11(b), 50 Stat. 888, 892-93 (1937).

In 1959 Congress reaffirmed this

original scheme by adopting what became known as the local autonomy amendment. It vested in local PHAs maximum responsibility for establishing rents subject to the U. S. Housing Authority's approval. Pub. L. No. 86-372, § 501, 73 Stat. 654, 679 (1959). Between 1959 and 1969, however, as operating costs escalated much more rapidly than tenants' incomes, PHAs had to increase rents, which either extracted exorbitant portions of low-income families' incomes or excluded them altogether. In response, Congress adopted the Brooke Amendment in 1969, beginning the process which by 1981 withdrew all the discretion PHAs originally had in setting rents.

The first step in that evolutionary process was the imposition of the 25 percent limitation and the provision of federal operating subsidies to cover the lost rental income. The next step was

taken in 1974, when Congress required PHAs to charge tenants minimum rents equal to five percent of the tenant's gross income or the tenant's welfare grant for housing. Pub. L. No. 93-383, 88 Stat. 633, 654 (1974). In 1974 Congress also amended the operating subsidy provisions to require PHAs to set rents high enough to make the sum of all the rent charged equal to at least 20 percent of the sum of all the incomes of the PHA's tenants. 42 U.S.C. § 1437g(b) (1982). These two 1974 provisions thus narrowed the band within which PHAs could set rents by establishing federal maximums and minimums.

In 1981 Congress completed the process by eliminating the last vestige of PHA discretion to choose their own rents. The 1981 statutory amendment specifies the exact criteria the housing authority must follow. Although PHAs

retain discretion regarding other aspects of the program, on the issue of rents, Congress made the federal laws paramount and granted the PHAs no autonomy.

Related statutory provisions are also informative. The original Brooke Amendment included a provision stating:

> the requirement . . .that the rents fixed by public housing agencies may not exceed one-fourth of a low-rent housing tenant's income shall be effective not later than 90 days following the date of the enactment of this Act.

Pub. L. No. 91-152, § 213(b), 83 Stat. 389 (1969). By making the statutory provision effective on a specific date, Congress revealed its understanding that this provision was mandatory, not precatory. That revelation is made even more clear by the reference in the quoted statute to the rent limitation as a "requirement," a reference which was not an isolated incident. The very next sentence of the amendment specified that

the "requirement" shall not apply if application of the rent limit would merely reduce a public housing tenant's welfare assistance. Id.

Again, in 1970 when it enacted a statutory definition of income, Congress expressly referred to the Brooke Amendment as the "one-fourth of family income limitation." Pub. L. No. 91-601, § 208, 84 Stat. 1770, 1778 (1970). Congress also required that the new income definition "shall be effective at the first annual re-examination of the tenants' income subsequent to March 24, 1971." As with the 1969 amendment, Congress' decision to impose a mandatory effective date indicates that the Brooke Amendment was not a precatory statutory provision.

The legislative history dictates the same conclusion. The Conference Report quoted above at p. 8, describes the amendment as limiting the rents that may

be charged. CONF. REP. NO. 740, 91st Cong., 1st Sess. 30 (1969). Again, in discussing the exclusion of welfare tenants from the amendment, the Conferees referred to the rent limitation as a "requirement." Id.

The revisions of the bill during the legislative process provide further convincing evidence of its mandatory nature. The bill Senators Brooke and MacIntyre introduced did not expressly limit rents to twenty-five percent of income. See S. 2761, 91st Cong., 1st Sess., 115 CONG. REC. 21973 (1969). Instead, it granted HUD new authority to make rental assistance payments to PHAs which would then be able to reduce tenants' rents to one-fourth of their incomes. The "one-fourth of tenants' income" language was used only to measure the amount of the rental assistance payment, i.e., the difference between one-fourth of the tenant's income

and the actual rental for the unit. The Senate Committee's bill maintained that structure. See S. 2864, 91st Cong, 1st Sess. § 211; S. REP. NO. 392, 91st Cong., 1st Sess. 46 (1969). The House and Senate Conferees added the language clearly indicating that the one-fourth of tenant's income standard was to be a mandatory federally prescribed rent limitation. See CONF. REP. NO. 740, 91st Cong., 1st Sess. 11 (1969). This evolution of the statutory language, from initial provisions which might not have been read as obligatory to one which clearly was, further illuminates the deliberate congressional intention that the rent limitations be mandatory.

HUD's actions further confirm that the Brooke Amendment and its implementing regulations are mandatory. Immediately after the statute was adopted, HUD issued a Circular directing housing authorities

how to implement the new rent limitation. HUD's March 16, 1970 Circular, supra note 3. That Circular made three important points. First, a tenant's rent must not exceed 25 percent of income. Second, the rent limitation had to be effective not later than March 24, 1970. Third, if the March 24, 1970, deadline could not be met, the rent adjustments had to be put into effect retroactively to March 24, 1970. Id. at 1, 3 and 6. The Circular's repeated use of the word "shall," its constant reference to the statute as a limitation and a requirement, and the retroactive implementation scheme indicate that HUD interpreted the statutory provision to be mandatory. That is explicitly confirmed by the Circular's statement that the statute did not affect the PHAs' rent-setting power "except as the Act requires that no tenant pay more than 25 percent of income

for rent . . . ." Id. at 3. Such a contemporaneous interpretation of a newly enacted statutory provision by the agency charged with its administration must be given great weight. See Udall v. Tallman, 380 U.S. 1, 16-17 (1965).

One month later, HUD reaffirmed that interpretation in its next implementing Circular. See HUD's April 24, 1970 Circular, supra note 4. That Circular, by its very title, indicated that HUD considered the statute mandatory. In the body of the Circular, HUD stated:

> The actions required by an LHA immediately are:
>
> 1. Recompute tenants' income, using latest verified family income and the Secretary's definition;
>
> 2. Compute rent at 25% of such income (see rent table, Appendix 3);
>
> 3. Compare with current rent to identify tenants entitled to reduction;
>
> 4. Notify affected tenants of adjusted monthly rent

and basis therefor;

5. Compute rent rebates from 3/24/70 to date adjustment is to be put into effect and apply as credit against future rent charges;

6. Reflect adjusted monthly rent in lease, as appropriate.

Id. at Appendix 1, p. 1. As Congress made further refinements in the Brooke Amendment in 1970 and 1971, HUD issued additional Circulars indicating how the local housing authorities should implement those changes.[7] The constant references throughout those Circulars to what the PHAs "shall" do leave no doubt that HUD interpreted the statute to be mandatory.

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7. HUD Circular, "New Definition of Income - Implementation of Section 208 of the Housing and Urban Development Act of 1970," HM 7465.10 (April 4, 1972); HUD Circular, "Implementation of Section 9, Public Law 92-213; Public Housing Rent Reductions, Welfare Families," HM 7465.13 (January 18, 1972) (hereinafter HUD's January 18, 1972 Circular); HUD Circular, "Additional Procedures for Implementing Section 9, PL 92-213, Public Housing Rent Reductions, Welfare Families," HM 7465.15 (September 14, 1972).

In 1975, when HUD finally published formal regulations in the Code of Federal Regulations to implement the Brooke Amendment's rent limitations, HUD adhered to its initial interpretation that the Brooke Amendment creates mandatory obligations. Former 24 C.F.R. §§ 860.401 through 860.409, 40 Fed. Reg. 44,324 (1975). Those regulations expressly directed that rent "shall not exceed" 25 percent of family income and constantly used the word "shall" in the regulatory definitions of income and other operative terms. Former 24 C.F.R. §§ 860.403 and 860.405. Similarly, HUD's current regulations, implementing the current version of the Brooke Amendment, use the same mandatory language. 24 C.F.R. § 913.107 (1985).

The mandatory nature of these federal laws is even more strikingly apparent in HUD's regulations specifying

how housing authorities must calculate reasonable use of utilities. See former 24 C.F.R. §§ 865.470 through 865.482, 45 Fed. Reg. 59,505 (1980). Throughout HUD repeatedly uses the word "shall" to indicate the actions which the PHA must take.[8] Any reading of these regulations must lead ineluctably to the conclusion that HUD has interpreted the Brooke Amendment to be mandatory and intends its implementing regulations to be equally as mandatory.[9]

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8. Thus, among other things, the regulations provide that the PHAs "shall establish" allowances (§ 865.473(a)); the allowances "shall be designed" to include utility consumption for major equipment (§ 865.473(b)); separate allowances "shall be established" for each utility and for each category of dwelling units (§ 865.474); the allowances "shall be based upon" consumption records (§ 865.476(a)); the allowances "shall be established" at levels sufficient to meet the requirements of about 90% of the dwelling units (§ 865.477); the surcharge "shall be computed" by applying the utility suppliers' average utility rate (§ 865.479); and, finally, PHAs "shall establish such allowances effective as of a date" not later than 120 days from the effective date of the rule (§ 865.482).

9. The 1984 regulations, which are not at

C. <u>These Mandatory Obligations Were Imposed to Protect Tenants' Interests</u>

For a law to create a right, the duties which it imposes on one party must be so imposed in order to protect the interests of a second party. Only if this second element is present can the legal provision be viewed as having "secured" a right. Courts have relied upon numerous factors to determine whether particular provisions of law create or secure rights. Whatever factors are considered to be relevant, whether they be the purpose of the law, the type of language used, the legislative history, or related statutory provisions, it is clear that the duties

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issue in this case, are similarly mandatory in nature. 24 C.F.R. §§ 965.470 through 965.480 (1985). As with the earlier regulations, HUD has repeatedly used the mandatory term "shall" to establish the steps which the PHAs must take and the standards which the PHAs must follow. E.g., 24 C.F.R. §§ 965.473, 965.474, 965.476(b), 965.476(d), 965.477, 965.478 and 965.480 (1985).

created by the Brooke Amendment and its implementing regulations secure the rights of public housing tenants.

An analysis of this element of the case must begin with the purpose of the Brooke Amendment. As is noted above, p. 16, by 1969 dramatic increases in operating costs had forced PHAs to raise rents so high that low-income families either paid exorbitant rents or were excluded from public housing altogether. Congressional recognition of this problem is evident in the legislative history of the 1969 amendment.[10] Congress' solution

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10. Senator McIntyre stated, "Local authorities have been forced to set minimum income requirements and raise rentals in order to meet the rising costs of maintenance and operation. As a result, more and more of the poor and very poor are barred from admission to public housing projects." 115 CONG. REC. 21,973 (1969). Senator Brooke argued: "tenants are unable, in many cases, to meet prior payment schedules without allocating a disproportionate share of their income to housing, and they find it impossible to do so as their rental payments increase still further." 115 CONG. REC. 26,721 (1969). Representative Dwyer observed: "the much higher costs of today are no longer able co be financed out of

was to impose the mandatory limit on tenants' rents to ensure that they would not be paying exorbitant portions of their incomes for rent and to provide additional subsidies for the rent lost by PHAs. Given the problem Congress faced, i.e., that poor people were paying too much, and the solution Congress chose, i.e., to limit the rent charged, it is clear that Congress' purpose was to protect the tenants' interests in not being charged more than they could afford.

This purpose is also revealed repeatedly in the legislative history. Every time the Amendment was discussed, either in a congressional report or on

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rental income and in many cases public housing rents now greatly exceed the tenants' ability to pay." 115 CONG. REC. 38,778 (1969) (see also remarks of Representative Sullivan); S. REP. NO. 392, 91st Cong., 1st Sess. 19 (1969) (operating costs "are too high for the very poor to bear"); 115 CONG. REC. 38,625 (1969) (remarks of Senator Proxmire).

the floor of the House or Senate, it was reiterated that the rent limitation was added to ensure that poor people could live in public housing without paying exorbitant rents. Senator Brooke's observation that "it would enable families, regardless of how low their incomes may be, to afford decent housing at a reasonable cost" is representative of the views expressed by all.[11]

Congress' language also shows that the rent limitations were imposed to create rights for tenants. It is noteworthy that the statute mentions only the families, the beneficiaries of the limitation, not the PHAs upon whom the duties are imposed. See 42 U.S.C. § 1437a(a) (1982). This focus upon the

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11. 115 CONG. REC. 21,973 (1969); see 115 CONG. REC. 21,974 (1969) (remarks of Senator MacIntyre); 115 CONG. REC. 26,721 (1969) (remarks of Senator Brooke); 115 CONG. REC. 38,778 (1969) (remarks of Representative Dwyer); S. REP. NO. 392, 91st Cong., 1st Sess. 19 (1969).

tenants in the statutory language is a strong indication that the federal laws create rights for these tenants. See, e.g., Cannon v. University of Chicago, 441 U.S. 677, 690, n.13 (1979); Howard v. Pierce, 738 F.2d 722, 725-26 (6th Cir. 1984).

Even more telling is the structure which Congress chose, i.e., setting the rent at a percentage of the family's individual income, instead of specifying particular dollar maximums or relating rents to factors other than the tenants' own financial circumstances. That choice reveals that this limitation is imposed in order to protect the interests of specific low-income tenants, not low-income people generally, the society at large, the PHAs or the federal government. Individualizing the rent limitation in this manner and to this degree makes it clear that the statute is

intended to create rights for those individual families.[12]

D. The Federal Laws Plaintiffs Rely Upon Are Sufficiently Specific to "Secure" Their Rights

By drawing an analogy to the principle that judicial review of federal agency action is precluded when there is "no law to apply," Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 410 (1971), one might conclude that some federal laws are not sufficiently specific to "secure" rights within the meaning

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12. That Congress was legislating to protect the tenants is also shown by the section of the original Brooke Amendment which specified that the rent limitation would not apply to a welfare family if HUD determined that limiting the rent would just reduce the family's welfare assistance. Pub. L. No. 91-152, § 213(b), 83 Stat. 379, 389 (1969). By thus making the limitation inapplicable when it would not benefit tenants, Congress revealed that the limitation itself was imposed in order to protect tenants. This concern with protecting tenants' interests is also reflected by Congress' insertion of the original amendment into a statutory provision that required housing authorities and HUD to consider the families' rent-paying abilities when fixing rents. Pub. L. No. 86-372, § 503, 73 Stat. 654, 680 (1959).

of Section 1983. Certainly reasoning of that sort is reflected in Phelps v. Housing Authority, 742 F.2d 816 (4th Cir. 1984), upon which the court below relied so heavily.

Nonetheless, the laws before the Court in this case are not of that character. The Brooke Amendment and its implementing regulations provide the judicially ascertainable standards the courts need to decide whether the law has been violated. The statute specifies with utmost clarity the amounts which tenants must pay as rent. 42 U.S.C. § 1437a(a) (1982). HUD's implementing regulations have clearly and continuously interpreted the statutory term "rent" to include payment for the use of a reasonable amount of utilities. See pp. 6-11, above. More importantly, HUD's regulations have set out clear and unambiguous standards which local housing

authorities must follow and steps the PHAs must take in determining the amount of utilities that tenants have a right to use without a surcharge. 24 C.F.R. §§ 965.470-480 (1985); former 24 C.F.R. §§ 865.470-482.

What is even more significant about this case is that the PHA did absolutely nothing to comply with the 1980 regulations. Instead, it merely "deemed" its allowances to be in compliance with the regulations. Int. Ans. No. 19(c). Thus, in deciding whether this housing authority has violated plaintiffs' rights, the court will have clearly ascertainable standards to guide its inquiry and will be performing a classic judicial function of applying law to the facts before it.

For example, the housing authority was obliged to base its allowances upon the actual consumption records for the types of units to be covered. Former 24

C.F.R. § 865.476(a). The Roanoke Housing Authority did not do that. The PHA was unambiguously obliged to establish the allowances high enough to meet the requirements of about 90 percent of the dwelling units. Former 24 C.F.R. § 865.477. Again, the Roanoke Housing Authority did not do that. The PHA was obliged to provide the tenants an opportunity to comment on the allowances. Former 24 C.F.R. § 865.482; see 24 C.F.R. § 965.473(c) (1985). The Roanoke Housing Authority did not do that. The PHA was obliged to submit the allowances to the HUD field office for approval. Former 24 C.F.R. § 865.473(a); see 24 C.F.R. § 965.473(d) (1985). Again, the Roanoke Housing Authority did not do that. To avoid tenant misunderstanding, the PHA was obliged to include a statement of the specific items of major equipment whose utility consumption requirements were

included in determining the amounts of the utility allowances. Former 24 C.F.R. § 865.473(b); see 24 C.F.R. § 965.473(c) (1985). Again the Roanoke Housing Authority did not do that.[13]

Thus, as the facts of this case graphically illustrate, a court which enforces public housing tenants' rights not to be surcharged for reasonable use of utilities will be undertaking a task which courts are well-equipped to perform and which is classically judicial in nature. To carry out that responsibility will not demand of the courts any expertise in the management of housing or in the intricacies of finance and economics.[14]

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13. See Int. Ans. Nos. 7, 10, 15, and 19.

14. It does not matter that the rights which tenants seek to enforce are made specific by the HUD regulations which implement the basic statutory provision. In 1969 this Court without dissent decided that rules promulgated by HUD pursuant to its general rulemaking power create rights for public housing tenants. Thorpe v.

II. CONGRESS HAS NOT PRECLUDED COURTS FROM ENFORCING THESE PLAINTIFFS' RIGHTS

A Section 1983 cause of action is unavailable when Congress has specifically precluded the plaintiffs from relying upon Section 1983 as authority to sue. Middlesex County Sewerage Authority v. National Sea Clammers, 453 U.S. 1, 20-21 (1981). This Court has made it very clear, however, that the burden is upon the defendant to show such congressional intent to preclude a Section 1983 cause of action and that a court should be very reluctant to reach that conclusion. Id. at 20, n.31; Smith v. Robinson, ___ U.S. ___, 104 S.Ct. 3457, 3469

Housing Auth., 393 U.S. 268 (1969). Significantly, in Thorpe the rule in question had not even been formally promulgated in the Federal Register for codification in the Code of Federal Regulations. Instead, it was merely an unpublished Circular which HUD intended to incorporate into its PUBLIC HOUSING MANUAL. Certainly, if the Circular in Thorpe could create rights, the more formal and specific regulations at issue in this case do so.

(1984). In this case Congress has taken no such preclusive step. That the exact opposite is true is demonstrated by a careful review of (1) the express actions Congress has taken regarding judicial enforcement of the Brooke Amendment; (2) the ever narrowing role which Congress has conferred upon HUD regarding the Brooke Amendment; and (3) the severely limited capacity which HUD has to enforce the Brooke Amendment.

A. Congress' Express Actions

Two legislative developments, in 1981 and in 1983, constitute the only express congressional actions regarding judicial enforcement of the Brooke Amendment by private parties. In 1981 Congress changed the Brooke Amendment, raising the rent-to-income ratio and authorizing HUD to define income. See Pub. L. No. 97-35, § 322, 95 Stat. 400 (1981). When it did so, Congress also

exempted from judicial review HUD's determinations regarding the phase-in of those changes. Id. at § 322(i). When Congress considered HUL's bill precluding judicial review, Representative Vento said he thought it quite unusual to preclude tenants from bringing suit in district court and asked the HUD witnesses why they were proposing to do so. In response they testified:

> The provision that you have raised a question about is addressed only at the 5-year phase in of the increase, and is not intended, as I understand, to eliminate any tenants rights beyond that point.[15]

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15. Hearings before the Subcommittee on Housing and Community Development of the House Committee on Banking, Finance and Urban Affairs, 97th Cong., 1st Sess., Part I, 654 (Serial No. 97-10, Apr. 8, 1981). HUD's written response for inclusion in the record on this question also defended the proposed preclusion of judicial review as follows:

> Limitations on reviewability are not unusual for narrowly drawn discretionary determinations of Federal officers.
>
> . . .

(Footnote continued)

Thus, even HUD understood its proposed 1981 preclusion of judicial review to be extremely limited and to preserve tenants' rights to enforce all other aspects of the Brooke Amendment.

Congress' action in 1983 is the most significant, however. Having quickly become dissatisfied with the only limit it had ever placed upon tenants' rights to enforce the Brooke Amendment, in 1983 Congress rewrote Section 322(i) of the 1981 Act and repealed the language which had exempted HUD's decisions from judicial review. Pub. L. No. 98-181, § 206(d) and (e), 97 Stat. 1180-81 (1983). This sequence of events, which constitutes Congress' only express action regarding judicial enforcement of the

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Review would be precluded only as to questions arising in the administration of the phase-in feature.

Id. at 655-656.

Brooke Amendment, provides a compelling demonstration that Congress' design is not to limit, but to maximize tenants' rights to enforce federal laws limiting their rents.[16]

B. Congress' Dissatisfaction with HUD

The ever-narrowing role regarding the federal rent limitations that Cong-

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16. HUD's own interpretation of the statute on this point is also significant. HUD's regulations immunize the PHA's utility allowances from tenant challenge unless they are arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law. 24 C.F.R. § 965.473(e) (1985). HUD's proposed regulations contained a provision precluding tenants from challenging allowances in federal courts and limiting the tenants to state court enforcement. Proposed 24 C.F.R. § 865.476(d), 47 Fed. Reg. 35,249, 35,254 (1982). In contrast, the final regulations allow federal court enforcement. 49 Fed. Reg. 31,403 (1984). HUD explained its changed position position as follows:

> some plaintiffs may prefer to challenge PHA determinations in Federal rather than State court and . . . the Department's power to preclude access to Federal court is doubtful. The Department also recognizes that not all States may have adopted procedures providing for judicial review of administrative action. Id.

ress has assigned to HUD reveals a congressional dissatisfaction with HUD which belies any claim that Congress desires HUD to be the exclusive enforcer. The 1969 Brooke Amendment assigned HUD the vital responsibility to define the income to which the 25 percent limitation was to be applied. Pub. L. No. 91-152, § 213(a), 83 Stat. 379, 389 (1969). Barely one year later, after HUD had established an income definition which was quite unfavorable to the tenants (HUD's March 16, 1970 Circular, supra note 3), Congress severely circumscribed HUD's discretion by specifying seven mandatory income deductions. Pub. L. No. 91-609, § 208(a), 84 Stat. 1770, 1778 (1970). In 1981 Congress lifted the restraints briefly. Pub. L. No. 97-35, § 322(a), 95 Stat. 400, 401 (1981). When HUD proposed a definition of adjusted income which Congress found too restric-

tive (47 Fed. Reg. 57,954 (1982)), Congress immediately withdrew the discretion it had granted in 1981 and dictated the adjustments to income in the statute. 42 U.S.C. § 1437a(b)(5) (1982).

A similar decision not to rely upon HUD is reflected even in the 1981 legislation that prescribed the rent formulas directly in the statute, revoking the PHAs' power to set their own rents at levels beneath the federal maximum and repealing HUD's previously conferred power to review those rents. Congress' repeated distaste for HUD's definitions of income and its removal of HUD from the rent approval process cannot be reconciled with any inference that simultaneously Congress was implicitly deciding that it would rely only upon HUD to enforce the tenants' rights.

C. HUD's Enforcement Capacity

Severe limitations in HUD's moni-

toring resources and enforcement structure rapidly became apparent when they are realistically scrutinized. Those limitations also make it difficult to conceive that Congress has silently chosen to rely solely upon HUD to enforce the rent limitation and thus to preclude Section 1983 enforcement.

To accurately appraise HUD's role as an enforcer, one must first review HUD's resources. In fiscal year 1986, nationwide there are 3,068 housing authorities, which operates 11,621 projects containing 1,270,761 units of public housing.[17] HUD has 11,663 employees, but only 1,113 of them have responsibilities relating to

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17. HUD, Congressional Justifications for 1986 Estimates, T-5 (March 1985), reprinted in HEARINGS ON DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT - INDEPENDENT AGENCIES APPROPRIATIONS FOR 1986, Subcommittee of House Committee on Appropriations, 99th Cong., 1st Sess., Part 5, p. 231 (1985) (hereinafter Congressional Justifications).

public housing. Id. at B-26and T-1.[18] Of those 1,113, only 973 are assigned to the HUD field offices (Id. at T-6), which have the major responsibility for monitoring PHAs.[19] Even within the field offices, only 449 of the 973 employees with public housing responsibilities have duties which relate to management. Congressional Justifications, p. T-12. When the 3068 PHAs are divided up among those 449 employees, HUD ends up, on an average, with only two staff months per year which can be devoted to any particular PHA.

Of course, only a minute fraction of the two months available for each PHA can

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18. HUD reports its staffing patterns in three formats, full-time permanent appointments, full-time equivalent, and staff years. We are using the figures for staff years as they are most comprehensive.

19. HUD, FIELD OFFICE MONITORING OF PUBLIC HOUSING AGENCY (PHA) ADMINISTRATION OF THE LOW-INCOME PUBLIC HOUSING PROGRAM, Ch. 1, ¶ 1-1(b) (Handbook No. 7460.7, 1981).

be devoted to monitoring and enforcing compliance with the federal laws relating to utility allowances. These 449 field office personnel are responsible for all aspects of public housing management. Because of the broad scope of that responsibility, HUD divides these employees into five separate specialist categories, only one of which -- Utility Specialist -- is concerned with utility issues. Id. at T-10 - T-11. Even for the utility specialists, tenants' utility allowances comprise only one small aspect of their jobs. They must also give attention to the types of utility services provided, the types of equipment utilized, energy conservation measures, insulation, and relations with the local utility companies. Id. Given these resources, it is clear that HUD cannot be relied upon to be the sole enforcer of these federal laws and one cannot pre-

sume, from congressional silence alone, that Congress was so foolhardy as to have done so.

HUD has also established no structure to facilitate effective enforcement of tenants' utility allowance rights. Most significantly, HUD has no mechanism for tenants to complain to HUD when their PHA surcharges for reasonable utility usage. HUD has administrative complaint procedures for some people.[20] HUD has established no such mechanisms for public housing tenants to complain to HUD when their PHA defies federal law in the setting of utility allowances. In fact, HUD does not even have any system to

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20. They include, for example, bankers, builders, and landlords, threatened with debarment because of past malfeasance (24 C.F.R. § 24.7); fund recipients facing grant termination because of racial discrimination (Id. at §§ 2.1-2.131); land subdividers charged with violating the Interstate Land Sales Registration Act (Id. at Part 1720) and private individuals seeking redress for discrimination by landlords, real estate agents and lenders. See Id. at §§ 105.11-105.22.

ensure that tenants are informed of their rights to adequate utility allowances, much less of a right to complain to HUD should those rights be violated.

This gap in HUD's enforcement efforts is reflective of HUD's long-standing antipathy toward any administrative mechanisms that might allow the intended beneficiaries of its programs to bring complaints to HUD for redress. Time after time, HUD has had to be goaded by the courts and Congress to recognize the rights of tenants to complain and to be heard.[21] Even when HUD does establish

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21. Compare 24 C.F.R. Part 450, 41 Fed. Reg. 43,330 (1976) with McQueen v. Drucker, 317 F. Supp. 1122 (D. Mass. 1970), aff'd on other grounds, 438 F.2d 781 (1st Cir. 1971). Compare 24 C.F.R. § 401, 40 Fed. Reg. 29,073 (1975) with Thompson v. Washington, 497 F.2d 626 (D.C. Cir. 1973) and Keller v. Kate Maremount Found., 365 F. Supp. 798 (N.D. Cal. 1972), aff'd, 504 F.2d 483 (9th Cir. 1974). Compare 24 C.F.R. § 882.216, 49 Fed. Reg. 12,215 (1984) with Nichols v. Landrieu, No. 79-3097 (D.D.C. injunction entered Sept. 12, 1980), subsequent opinion on attorneys' fees, 740 F.2d 1249, 1251-52 (D.C. Cir. 1984). See 24 C.F.R. Part 245, 50 Fed. Reg. 32,396 (1985), implementing 12

a tenant complaint system, most often the system uses some forum other than HUD, either the courts, the PHAs or the private landlords, with no right to appeal to HUD.[22] HUD's long-standing antipathy toward the filing of tenant complaints at HUD should make a court chary of presuming that Congress intended HUD to enforce tenants' rights.

HUD also has no mechanisms to trigger its own enforcement of the utility allowance requirement in a timely and effective manner. As the facts of this case demonstrate, one cause of PHA noncompliance with the federal law is inaction by the PHA caused by either its failure to monitor its utility allowances or a deliberate decision to disregard the rules. HUD does require housing authori-

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U.S.C. § 1715z-1b, Pub. L. No. 95-557, § 202, 92 Stat. 2088 (1978).

22. See 24 C.F.R. § 247.6 (1985) (courts); 24 C.F.R. § 882.216 (1985) (PHAs).

ties to review and adjust their utility allowances annually. 24 C.F.R. § 965.478 (1985). However, HUD does not require PHAs to file reports summarizing their annual reviews and has no other triggering device to alert it to non-compliance of this type. HUD previously required that PHAs to submit their allowances to HUD for approval. Former 24 C.F.R. § 865.473. Thus, HUD could catch allowances which were set improperly, either too low or too high. In its 1984 regulations, HUD withdrew the HUD approval requirement (24 C.F.R. § 965.473(d) (1985)), thus eliminating HUD's only mechanism for timely detection of improper utility allowances.

All that is left to trigger HUD enforcement is HUD's promise that utility allowances "will be reviewed in the course of audits or reviews of PHA operations." Id. HUD's audit and review

functions are governed only by an internal handbook.[23] Limited utility reviews, done in accordance with the Handbook, will not provide the relief tenants need. In ideal circumstances, they are scheduled only once every four years and they need be scheduled only once every eight years. Id. at Ch. 6, ¶ 6-2(b). In-depth utility reviews will provide no more satisfaction. They could be triggered by a significant number of tenant complaints, (Id. at Ch. 6, ¶ 6-2(a) and Ch. 2, ¶ 2-1(c)(1)(g) and (i)), but with no established tenant complaint structure and no scheme to inform tenants of their right to complain, that trigger will rarely be tripped.

Moreover, the field office personnel

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23. HUD, FIELD OFFICE MONITORING OF PUBLIC HOUSING AGENCY ADMINISTRATION OF THE LOW-INCOME PUBLIC HOUSING PROGRAM (Handbook No. 7460.7, Rev., Sept. 6, 1985).

are allowed as much as four years from the identification of the problem to begin the review (Id. at Ch. 6, ¶ 6-1(a)) and no review question specifically asks whether the PHAs have conducted annual reviews or whether utility rates have increased by 10 percent or more. Id. at Appendix 12. Neither the timing nor the content of HUD's review scheme engenders any faith that HUD can be relied upon to enforce tenants' rights to adequate utility allowances.

Any limited hopes one might have that HUD could safely be relied upon are dashed by a candid appraisal of HUD's financial incentives. When utility allowances are adjusted upwards in compliance with federal law, it is HUD, not the housing authority, which ends up paying the extra costs. When the utility surcharges paid by the tenants decrease, the operating subsidies from HUD in-

crease, dollar for dollar. 24 C.F.R. § 990.104(a) (1985). Thus, HUD has a strong financial incentive not to enforce tenants' rights not to be surcharged for reasonable utility use.

If there were any doubt about HUD's incapacity to enforce the utility requirements, a report done by the HUD Inspector General would dispel it.[24] The Report summarizes its findings regarding HUD field office enforcement as follows:

> Field Offices were not adequately reviewing and analyzing PHAs' utility operations. As a result, deficiencies directly affecting tenants' utility allowances and HUD operating subsidies were not disclosed. Field Office reviews and analyses did not identify those PHAs: (1) using outdated or inadequate utility allowances; (2) using utility allowances which were not approved by HUD; (3) not charging tenants for excess utility usage or charg-

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24. HUD, Office of Inspector General, UTILITY CHECK-METERING AND ALLOWANCES (81-TS-101-0012 August 6, 1981).

> ing for excess utility usage at a rate below the PHAs' cost; or (4) paying retail utility bills. In addition, when Field Office reviews and analyses did disclose a deficiency, follow-up action was not taken to ensure that the reported problem was corrected.

Id. at p. 12.

There is, thus, no basis to fairly conclude that Congress could have assigned to HUD the exclusive right to enforce the federal laws guaranteeing tenants adequate utility allowances and thereby silently repealed the tenants' rights to do so under Section 1983.

III. REFUND OF PLAINTIFFS' MONEY IS AN APPROPRIATE REMEDY IN THIS ACTION

An order requiring the defendant to return the money that it wrongfully extracted from plaintiffs is an appropriate remedy in this action.[25] The

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25. Whether a particular remedy is appropriate presents a question which is distinct from the question whether private parties have a cause of action. See, e.g., Davis v. Passman,

determination whether the remedy is appropriate begins with the principle that "where legal rights have been invaded and a cause of action is available, a federal court may use any available remedy to afford full relief." Guardians Association v. Civil Service Commission, supra, 463 U.S. at 595 (White, J., citing, Bell v. Hood, 327 U.S. 678, 684 (1946)). In certain situations it may not be appropriate to grant monetary relief to redress local government violations of federal laws.[26] However, this is not such a case.

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442 U.S. 228, 239 (1979); Guardians Association v. Civil Service Commission, 463 U.S. 582, 595 (1983). Thus, considerations about the remedy are not relevant to the determination whether plaintiffs have a cause of action under Section 1983.

26. See Guardians Association v. Civil Service Commission, supra, at 596 (White, J.). But see id. at 612 (O'Connor, J., concurring in judgment), 624-34 (Marshall, J., dissenting), and 635 (Stevens, J., joined by Brennan and Blackmun, JJ., dissenting).

Here plaintiffs seek a limited remedy, i.e., return of their money that was wrongfully taken from them. That remedy raises no concerns about unfairness that more open-ended liability might create. The amount to be awarded any claimant would be limited to the amount which the PHA has wrongfully taken from that claimant. The recovery is measured by a strict standard, unlike tort damages where flexibility accorded to triers of fact can lead to more open-ended liability. Just as importantly, the refund ordered will exactly equal the amount which the PHA has gained through its wrongdoing. Unlike a tort or contract damage action, where a plaintiff's award is not limited to the benefit the defendants have gained from their wrongdoing, here the PHA will not be obliged to pay money it never received. The number of claimants is also limited, not open-

ended. The only qualified claimants are tenants who have lived in defendant's projects and from whom the defendant has illegally extracted money. Thus, this case is not like one in which a welfare department risks liability to a large, unknown number of potential recipients who may be wrongfully disqualified.

More fundamentally, however, allowing a PHA to keep money which it had wrongfully taken from its tenants provokes a profound sense of injustice. To the extent that a court decides that a PHA has violated federal law when requiring its tenants to pay utility surcharges, the inevitable conclusion must be that the money so taken rightfully belongs to the tenants. Fairness demands that it be returned to them.

This case also raises no concern about liabilities a local government did not and could not anticipate. Compare

Guardians Association, supra, 463 U.S. at 596. The defendant's conduct constitutes a knowing violation of clear conditions imposed by Congress and HUD. The PHA's obligation not to charge more than the federal maximum for rent and not to surcharge for reasonable use of utilities have been clear and unambiguous since 1970. The standards and procedures the PHA must follow in determining what utility usage is reasonable have also been clearly and unambiguously spelled out since 1980. 45 Fed. Reg. 59,502 (1980). The defendant was clearly made aware of these obligations and had ample time to comply. The regulations were published in the Federal Register, the PHAs were allowed more than 120 days to comply (former C.F.R. § 865.482) and the local HUD field office individually notified the PHA about the new regulations. Int. Ans. No. 19. Thus in this

case the defendant cannot and does not claim ignorance of these federal rules.

The defendant does not contend that it took the steps required by the 1980 regulations or that its utility allowances were in fact in conformity. Instead, having no colorable defense or justification for not complying with the federal law, defendant merely asserts that it "deemed" its old allowances to be in compliance with the 1980 regulations. Int. Ans. No. 19(c). Given the clarity of the federal laws and the defendant's deliberate disdain for them, this is a situation where one can only conclude that defendant knew or should have known of its wrongdoing.

It is also important to remember that, unlike some cooperative federalism programs, the public housing program requires local government participants to make 40-year commitments to own and

operate the housing projects in accordance with federal law. The federal government provides all the subsidies needed to pay the costs not covered by tenants' rents. As this Court recognized in Thorpe v. Housing Authority, 393 U.S. 268, 279 (1969), Congress and HUD have retained the power to create additional rights for the tenants and correlative obligations for the housing authority, at least as long as the federal government provides the financial resources the PHAs need to meet those obligations. The revenue losses PHAs encountered because of the rent limitation Congress imposed in 1969 and the implementing utility usage standards HUD promulgated in 1980 were fully offset by increased operating subsidies from HUD. Thus, this is not a case in which a court should withhold a damage remedy because a local government has retained a privilege to withdraw when

faced with unanticipated burdens.

Because of the long-term commitments that federal housing landlords make and the federal government subsidies which cover expenses that exceed rents, the normal practice in the federal housing programs has been to provide refunds when tenants have been unlawfully overcharged. Numerous examples demonstrate this.[27] Some of them are in the utility allowance

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27. HUD's initial Brooke Amendment Circular specified that PHAs which were unable to comply by March 24, 1970, would have to do so retroactively. HUD's March 16, 1970 Circular, supra note 3, p. 3. The HUD Circular implementing the 1971 welfare amendment also required PHAs to make the changed rents retroactive to the statute's effective date. HUD's January 18, 1972 Circular, supra note 7, p. 2. HUD's regulations implementing the 1983 statutory definitions of adjusted income established an elaborate system of rent credits and refunds for tenants who were overcharged after the regulations became effective. 24 C.F.R. § 913.110(f) and (g) (1985). Finally, HUD's AUDIT HANDBOOK expressly recognizes a PHA's obligation to reimburse tenants who have been improperly overcharged and contemplates retroactive increases in operating subsidies to offset the PHA's cost of doing so. HUD, PUBLIC HOUSING AUDIT HANDBOOK, Ch. 4, ¶ 3-3(f)(2) (Handbook No. 7465.2, Rev. Sept. 1985).

area itself.[28] Most significantly for the case before this Court, the 1980 regulations specified that the PHAs were to establish allowances in conformance with the new standards "effective as of a date no later than 120 days from the effective date of this rule . . . ." Former 24 C.F.R. § 865.482. As with the initial Brooke Amendment Circular, HUD in this regulation required PHAs that did not meet the 120-day deadline to retroactively make their changes effective as of the 120-day date. Thus, here, a court-ordered refund provides the most appropriate relief.

CONCLUSION

Public housing tenants have a federally secured right not to be surcharged when they use only a reasonable

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28. HUD's 1984 regulations specifically require that adjustments in allowances that result from rate changes must be made retroactive to the time of the rate change. 24 C.F.R. § 965.478(b) (1985).

amount of utilities in their homes. Congress has expressed no intention to prevent tenants from using the presumptively available § 1983 cause of action to enforce that federal right in federal court. The appropriate remedy to redress the injury to plaintiffs is a court order requiring the defendant housing authority to return the moneys it wrongfully took from plaintiffs. For those reasons the decision of the Court of Appeal should be reversed.

Respectfully submitted,

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March 28, 1986

IN THE SUPREME COURT OF THE
UNITED STATES
October Term, 1985

No. 85-5915

BRENDA E. WRIGHT, et al., Petitioners,

v.

CITY OF ROANOKE REDEVELOPMENT AND HOUSING AUTHORITY, Respondent.

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of March, 1986, packages containing three copies of the foregoing Brief for Amicus Curiae, National Housing Law Project, were deposited in the Post Office at Berkeley, California, with first class postage, prepaid, addressed to:

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Catherine M. Bishop
Counsel for Amicus Curiae

No. 85-5915

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

BRENDA E. WRIGHT, GERALDINE H. BROMAN, and SYLVIA P. CARTER, Individually and on behalf of all persons similarly situated,

Petitioners,

v.

CITY OF ROANOKE REDEVELOPMENT AND HOUSING AUTHORITY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* AND BRIEF OF THE NATIONAL ASSOCIATION OF HOUSING AND REDEVELOPMENT OFFICIALS, THE HOUSING AND DEVELOPMENT LAW INSTITUTE, THE PUBLIC HOUSING AUTHORITIES DIRECTORS ASSOCIATION AND THE HOUSING AUTHORITY OF THE CITY OF LAS VEGAS, NEVADA

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The National Association of Housing and Redevelopment Officials, the Housing and Development Law Institute, the Public Housing Authorities Directors Association and the Housing Authority of the City of Las Vegas, Nevada, respectfully move this Court for leave to file the attached brief after the time provided in Rule 36 for the filing of a brief *amicus curiae*. This motion and brief in support of Respondent is submitted with the written

consent of counsel for both parties filed with the Clerk of the Court.[1]

Amici did not become aware that this case was before the Supreme Court until after the time limit prescribed by Rule 36 of the Rules of this Court for filing briefs *amicus curiae*. As soon as they learned this fact, *Amici* moved expeditiously to obtain counsel who immediately commenced preparation of this brief.

The decision of the Court in the present case will have a significant and long-lasting impact on each of the *Amici* and their members. This Court has generally permitted the participation of industry and other national associations in cases such as this, which involve issues of special concern to a particular sector of the economy or industry nationwide.[2]

The National Association of Housing and Redevelopment Officials ("NAHRO") is the largest national organization of public officials in housing, community development and redevelopment. NAHRO was created in 1933 and currently has 2,170 agency members and 5,092 individual members. The agency members include 1,527 housing authorities engaged in the management and development of low-income housing. More than 90 percent of the 1.25 million public housing units in this country are owned and managed by NAHRO members.

Because of the size and diversity of its membership, its more than 50 years of accumulated experience with assisted housing, and its broad goal of improving the overall standard of housing in the United States, NAHRO can make a uniquely important contribution to this case. NAHRO can assist the Court in evaluating the nationwide impact and practical significance of the issue presently before the Court by supplying information and a perspective not presented by the parties.

The Housing and Development Law Institute ("HDLI") is a national resource center focusing on the legal issues facing local housing and development agencies. Its membership includes approximately 140 housing authorities and their counsel. Because HDLI's role is to serve as a resource and forum for the exchange of information and ideas on legal problems such as the one presented in this case, it is in the best position to provide this Court with information on the practical impact and importance of the pending decision for public housing agencies nationwide.

The Public Housing Authorities Directors Association ("PHADA") is an organization of more than 800 public housing authority Executive Directors across the United States. Its primary purposes are to keep public housing authorities informed about regulatory and congressional action on matters affecting public housing and to provide educational and training programs for senior housing management officials. Given its membership and purposes, PHADA has a special interest in legal issues which affect the efficiency and cost of public housing management.

The Housing Authority of the City of Las Vegas, Nevada ("Las Vegas Housing Authority"), acquires, constructs and manages low-cost housing in the city of Las Vegas. It owns over 3,000 housing units, including about 2,600 units which are part of the public housing program financed by the federal government. It is currently a defendant in a suit brought under the United States Housing Act of 1937 and 42 U.S.C. § 1983 in which public housing tenants are challenging certain fees it charges.

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[1] *See* letter dated June 18, 1986 from Bayard E. Harris, on behalf of Respondent City of Roanoke Redevelopment and Housing Authority, and letter dated June 18, 1986 from Henry L. Woodward, on behalf of Petitioners Brenda E. Wright et al.

[2] *See, e.g., Western Airlines v. California*, 53 U.S.L.W. 3484 (U.S. Jan. 7, 1985) (Motion of Air Transport Association of America for leave to file brief *amicus curiae* granted); *Peick v. Pension Benefit Guaranty Corp.*, 465 U.S. 1098 (1984) (American Trucking Association).

The consequences of the decision in this case will be felt by the entire public housing industry, not just by the City of Roanoke Redevelopment and Housing Authority. Because they represent such a wide cross-section of housing authorities, NAHRO, HDLI and PHADA are in a position to convey the industry's concern with this decision and to present factual information that will underscore this concern. Similarly, because the facts relating to the Las Vegas Housing Authority differ materially from those before the Court in the instant case, Las Vegas can advise the Court as to the wider dimensions of the issue presented. Thus, NAHRO, HDLI, PHADA and the Las Vegas Housing Authority respectfully submit that their participation as *Amici Curiae* will assist the Court in resolving this case by providing a broad perspective on the decision below and its impact on the public housing program.

For the foregoing reasons, NAHRO, HDLI, PHADA and the Las Vegas Housing Authority respectfully move this Court for leave to file a brief *amicus curiae*, beyonu the time period set forth in Rule 36, supporting the position of Respondent.

Respectfully submitted,

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This brief in support of Respondent is submitted with the written consent of counsel to both parties filed with the Clerk of the Court.

INTEREST OF THE *AMICUS CURIAE*

The National Association of Housing and Redevelopment Officials ("NAHRO") is the largest national organization of public officials in housing, community development and redevelopment. NAHRO was created in

1933 and currently has 2,170 agency members and 5,092 individual members. The agency members include 1,527 housing authorities engaged in the management and development of low-income housing. More than 90 percent of the 1.25 million public housing units in this country are owned and managed by NAHRO members.

The Housing and Development Law Institute ("HDLI") is a national resource center focusing on the legal issues facing local housing and development agencies. Its membership includes approximately 140 housing authorities and their counsel. HDLI serves as a resource and forum for housing authority counsel to exchange information and ideas on legal problems such as the one presented in this case.

The Public Housing Authorities Directors Association ("PHADA") is an organization of more than 800 public housing authority Executive Directors across the United States. Its primary purposes are to keep public housing authorities informed about regulatory and congressional action on matters affecting public housing and to provide educational and training programs for senior housing management officials. PHADA has a special interest in legal issues which affect the efficiency and cost of public housing management.

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The consequences of the decision in this case will be felt by the entire public housing industry, not just the City of Roanoke Redevelopment and Housing Authority. Representing a wide cross-section of housing authorities, NAHRO, HDLI, PHADA and the Las Vegas Housing Authority seek, as *Amici* in this case, to convey the industry's conviction that the resolution of public housing rent disputes should remain within the province of state courts as intended by the framers of the public housing program.

SUMMARY OF ARGUMENT

I.

Over 1.25 million tenant families reside in public housing projects in this nation. Because the construction and, to a lesser extent, the operation of these projects are subsidized by the federal government pursuant to the United States Housing Act of 1937, the local housing authorities which own and operate these projects must follow federal regulations in making annual rent determinations for each of these families. These calculations are highly individualized and depend on a myriad of factors affecting income and utility utilization. If Section 1983 can be utilized to enforce the statutory limitations applicable to public housing rents in federal court, each rent adjustment has the potential to become a federal case with the attendant delays and expenses. The resulting burden upon public housing authorities and the federal courts could be insuperable.

II.

Congressional intent must be examined to ascertain whether a Section 1983 remedy is available to enforce public housing rent limitations under the United States Housing Act of 1937. The "contemporary legal context" of the 1937 Housing Act, the traditional role of

the states and the overall legislative scheme reflect an intent to supplant a Section 1983 remedy.

Decentralization was a prominent theme in the enactment of the public housing program in 1937, reflecting strong and explicit federalism concerns. The respective roles of the federal government and the local authorities have remained the same since that time: the federal government is the financier and regulator while the local authority is the owner and operator of public housing. It would distort these roles and subvert the intent of the Congress to make the federal courts the arbiters of public housing rent disputes between the owner and the tenant.

Each local housing authority has obligations to the federal government which flow from a contract incorporating by reference the Housing Act and implementing regulations. In contrast, the rights of public housing tenants flow from their leases. The local public housing authority is answerable in state court for violations of those rights. This is traditionally the forum for resolving landlord-tenant disputes, whether the owner is a public or private entity. Recent amendments to the Housing Act are premised on the availability of state remedies. The decision of the court below is thus consistent with the history of both the enactment and the enforcement of the law.

ARGUMENT

I. THE AVAILABILITY OF A SECTION 1983 REMEDY TO RESOLVE PUBLIC HOUSING RENT DISPUTES WOULD IMPOSE A TREMENDOUS BURDEN ON THE FEDERAL COURTS AND PUBLIC HOUSING AGENCIES.

Over 1.25 million families in this nation currently lease and occupy public housing units. Their landlords are among 3005 public housing authorities created pursuant to state enabling statutes.[1] These authorities build, own and operate housing projects for low-income families.[2] The federal government finances the construction of the projects and partially subsidizes their operating expenses, as authorized by the United States Housing Act of 1937[3] ("Housing Act"); it does not own, and is not permitted to own, a single unit of public housing.[4]

In consideration of federal financial assistance to build and operate their projects, the local housing authorities

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[1] M.L. Matulef, *NAHRO Housing and CD Agency General Characteristics* 2, 4 (NAHRO 1986).

[2] For a short overview of the origins and structure of the public housing program, see Gelletich, *Federal Housing and Community Development Programs and the Local Authority*, in The Commissioner's Legal Handbook at 3-4 (HDLI 1986).

[3] 42 U.S.C. §§ 1437 *et seq.* (1982 & Supp. II 1984). Federal operating subsidies constitute half of the money needed to operate public housing. Rents paid by tenants make up 43% of the necessary additional funds and the balance is derived from investments and miscellaneous sources. *See* U.S. Dep't of Housing and Urban Development, Low Income Public Housing Program, Statement of Operating Receipts and Expenditures, Fiscal Year Ended March 1983.

[4] In fact, the federal government was ousted from an ownership role in 1936 by the decision in *United States v. Certain Lands*, 9 F. Supp. 137 (W.D. Ky.), *aff'd*, 78 F.2d 684 (6th Cir. 1935), *cert. denied*, 297 U.S. 726 (1936). This decision was a critical factor in the structuring of the Housing Act a year later.

agree to follow regulations issued by the U.S. Department of Housing and Urban Development ("HUD").[5] Under these regulations, the housing authorities must obtain income certifications from all tenants each year and determine their rents with reference to their income.[6] Statutory limits set the parameters for these rent calculations, but each determination must be made individually. The primary factor in the computation is family income from all sources, but, because of the complexity of the definition,[7] opportunities for errors and differences in judgments abound. These calculations are further complicated by the computation of utility allowances which must take into account "estimated Utility consumption attributable to tenant-owned major appliances or to optional functions . . . of PHA-furnished equipment."[8] It is not surprising that, under these circumstances, rent disputes, which may culminate in eviction proceedings, are common.[9]

From these facts, it is apparent that the result Petitioners seek here—to use 42 U.S.C. § 1983 to enforce Housing Act rent limitations—could have a major impact on both the housing authorities and the federal courts. Well over a million individual public housing rent decisions are made each year. Many other policy decisions are made affecting methods of calculation and

[5] *See infra* notes 16 and 17 and accompanying text.

[6] 24 C.F.R. § 960.209(a) (1985). Tenants' compliance with this process is secured by a mandatory provision in their leases. 24 C.F.R. § 966.4(c) (1985).

[7] Income includes such items as welfare, salaries, interest, periodic insurance proceeds (but not lump sum insurance payments), alimony, regular gifts (but not sporadic gifts), and scholarship amounts in excess of tuition and fee expenses. 24 C.F.R. § 913.106 (1985).

[8] 24 C.F.R. § 965.477(b) (1985).

[9] *See, e.g., Greenville Housing Authority v. Salters*, 316 S.E.2d 718 (S.C. Ct. App. 1984), *cert. denied*, 105 S. Ct. 1218 (1985).

definitions of terms. If the Petitioners prevail, each of these decisions could become federal cases with the attendant delays and expenses.[10] This is why the outcome of this case is so important to the *Amici*.

II. THE CONGRESSIONAL SCHEME FOR ENFORCING PUBLIC HOUSING RENT LIMITS SUPPLANTS ANY SECTION 1983 REMEDY.

A. The Intent of Congress Is the Touchstone for Ascertaining Whether a Section 1983 Remedy Is Unavailable.

Whether a Section 1983 remedy is available to enforce public housing rent limits depends in the first instance[11] on whether Congress supplanted such a remedy when it enacted the Housing Act. *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1, 21 (1981). It is difficult to discern congressional intent in this regard since the Housing Act was adopted a half-century ago, long before this Court ruled that

[10] For example, as of what date must a tenant's rent be reduced when an income-earning family member moves out of the unit? *See Greenville Housing Authority v. Salters, supra*. Are gifts "casual" and "sporadic" or "regular"? Was a child who earned a certain amount of money under 18 at the time, and are her earnings therefore excludable from "income"? The definition of "rent" also contributes to controversy. Maintenance charges have been held not to be rent, applying local law. *District of Columbia v. Montgomery*, L&T No. 91801-80, slip op. at 14 (D.C. Super. Ct. Mar. 12, 1981). Nor are security deposits. *Peterson v. Oklahoma City Housing Authority*, 545 F.2d 1270, 1274-75 (10th Cir. 1976). Whether range and refrigerator fees are part of rent is currently at issue in *Brown v. Housing Authority of Las Vegas*, No. CV-LV-86 305-HDM (D. Nev.).

[11] The second inquiry, which the *Amici* do not address here, is whether the Housing Act created the kind of rights that are enforceable under § 1983. *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 28 (1981); *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1, 19 (1981).

Section 1983 was available to enforce federal statutory rights.[12] Nevertheless, the statutory scheme for enforcing rent limits, as amended as recently as 1983, and the "federalism concerns" which permeated the original concept of the public housing system, confirm the view of the *Amici* that Congress "intended to supplant any remedy that otherwise would be available under § 1983." *Sea Clammers*, 453 U.S. at 21.

This Court has not expressly spelled out the factors that should be examined to ascertain intent in this situation. We share the view of Respondent, however, that the kinds of evidence of legislative intent that this Court has identified in other contexts are pertinent to this inquiry as well.[13] For example, congressional intent is critical in analyzing whether a private right of action may be implied from a federal statute. *Sea Clammers*, 453 U.S. at 13; *Texas Industries v. Radcliff Materials, Inc.*, 451 U.S. 630, 639 (1981).

As part of this analysis, the Court has considered whether a private right of action was part of the "contemporary legal context" in which the Congress legislated, *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 381 (1982), the identity of the class benefitted, the traditional role of the states in the area and the overall legislative scheme, *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. at 639. When applied in this case, these factors demonstrate that Section 1983 was never meant to be an available remedy to resolve public housing rent disputes.

B. "Federalism Concerns" Which Pervaded the 1937 Housing Act Are Evidence that a Section 1983 Remedy Is Unavailable.

When it was adopted in 1937, the Housing Act "contemplate[d] a complete decentralization of the housing

[12] *Maine v. Thiboutot*, 448 U.S. 1 (1980).

[13] Brief for Respondent at 34-36.

program." H.R. Rep. No. 1545, 75th Cong., 1st Sess. 2 (1937).[14] Consistent with this intent, a provision that authorized the federal government to develop and operate public housing projects on a demonstration basis was stricken from the bill.[15] In fact, the law incorporated authorization for the disposition of housing previously constructed by the federal government "in order that the Federal Government may move in the direction of getting out of the housing business." 81 Cong. Rec. 9588 (1937) (statement of Senator Walsh).

Since that time, the Housing Act has been frequently amended, but the respective roles of the federal government and local authorities have remained the same: the federal government is the financier and regulator while the local authority is the owner and operator of public housing. Consistent with these roles, federal court is the place to resolve disputes between HUD and the local authority, whereas state court is the proper forum for handling controversies between the local authority, as owner, and its tenants. If Section 1983 can be used to make the federal courts the arbiters of rent disputes between the owner and the tenant, this statutory framework, and the intent of the Congress in designing it, will be subverted.

[14] *See also* S. Rep. No. 933, 75th Cong., 1st Sess. 10 (1937). When asked who was responsible for building and owning public housing projects, Senator Wagner responded, "The local authority. It is an absolutely decentralized bill." 81 Cong. Rec. 7980 (1937); *see also* 81 Cong. Rec. 7988-89 (1937).

[15] Secretary Ickes submitted a statement which was offered by Senator King as part of his remarks supporting the elimination of this provision. Secretary Ickes advocated the "authorization of a purely non-Federal housing program . . . except for Federal financial and technical assistance." 81 Cong. Rec. 8179 (1937). In the House, Congressman Hancock echoed this view, saying that "permanent Federal Government landlordism and janitorism should never be part of the policy of the bill." 81 Cong. Rec. 9249 (1937).

C. Public Housing Rent Limits Are Intended To Be Enforced Through Local Agency Procedures and State Courts.

By accepting federal subsidies to finance and operate their project, public housing authorities obligate themselves to obey the Housing Act and to follow HUD regulations issued pursuant to that statute. The document that spells out these obligations is the Annual Contributions Contract ("ACC") which HUD and the public housing authority sign.[16]

Public housing tenants are not parties to the ACC. The terms of their relationship with the PHA are spelled out in their lease and their rights and obligations flow from this document. Among these obligations is the duty to pay the rent stated and to submit the information needed to adjust their rent annually based on family income and composition.[17] A tenant's claim that rent was incorrectly determined, therefore, arises from the lease agreement. Like other lease violations, it may be asserted in the forum designated by the state for hearing landlord-tenant disputes.[18] With respect to such disputes, public housing tenants stand in the same position as any other tenants who seek to enforce their rights and interests.

Until Section 1983 was recognized as a vehicle to enforce statutory rights, it was presumed that state courts

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[16] HUD accordingly has the power and responsibility to enforce those provisions of law against any agency which enters into an ACC. The ACC says this explicitly and provides three methods of enforcement: court action, reconveyance and termination of funds. An ACC is part of the record in this case (R. 30). The enforcement provisions are in §§ 401f, 502 and 508.

[17] 24 C.F.R. § 966.4(c); 24 C.F.R. Part 913.

[18] Many jurisdictions have specialized housing or landlord-tenant courts created for the very purpose of hearing such disputes. *See, e.g.*, Urban Housing Courts and Landlord-Tenant Justice: National Models and Experience (ABA 1977).

provided a forum that was both appropriate and adequate for public housing tenants with a grievance against their landlord. For example, when this Court ruled that a public housing authority was required to notify a tenant of the reasons for terminating his tenancy, it also observed that the tenant could "effectively challenge their legal sufficiency in whatever eviction proceedings may be brought in the North Carolina Courts." *Thorpe v. Housing Authority of Durham*, 393 U.S. 268, 284 (1969).

Not surprisingly, both the Fourth and the Eleventh Circuits have observed that landlord-tenant relations are "customarily the domain of state law." *Brown v. Housing Authority of McRae, Georgia*, 784 F.2d 1533, 1539 (11th Cir. 1986); *Perry v. Housing Authority of Charleston*, 664 F.2d 1210, 1216 (4th Cir. 1981). The hundreds of public housing rent-related eviction actions resolved each year in the state and local courts are further evidence that this is the norm. Even where public housing projects have been mismanaged, one district judge commented that "the federal courts cannot pretend to be the cure-all for America's housing ills. Federal courts lack the expertise, the staff and the congressional mandate to do the job." *Boston Public Housing Tenants' Policy Council, Inc. v. Lynn*, 388 F. Supp. 493 (D. Mass. 1974) (granting HUD's motion for summary judgment).

Congress rightfully was concerned about whether state and local courts offered adequate forums to protect the due process rights of public housing tenants. For this reason, three years ago it commanded HUD to require public housing authorities to provide grievance procedures which satisfied the constitutional standards of due process to hear tenant complaints about adverse actions, including evictions.[19] However, the new law also provided an exemption in connection with terminations of tenancy for

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[19] This statutory requirement was superimposed on a HUD regulatory requirement that had been in effect for many years. H.R. Rep. No. 123, 98th Cong., 1st Sess. 35 (1983).

public housing authorities in jurisdictions where tenants' rights were adequately protected in the state or local courts. The Congress stressed, however, that HUD must make a determination of adequacy "with respect to each court system or level in each state." [20]

This language reflects the long-standing assumption implicit in the Housing Act that disputes over rights arising from leases belong in state and local courts.[21] Section 1983 should not be utilized to override both the intent of the Congress under the Housing Act and a half-century of history.

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[20] Staff of Subcomm. on Housing and Community Development of the House Comm. on Banking, Finance and Urban Affairs, 98th Cong., 2d Sess., Compilation of the Domestic Housing and International Recovery and Financial Stability Act of 1983, at 321 (Comm. Print 1984); *see also* Section-by-Section Summary of H.R. 3959, Housing & Urban-Rural Recovery Act of 1983, *id.* at 149, 163 ("An agency may exclude procedures for eviction . . . if the local jurisdiction requires a court hearing which the Secretary determines will provide the basic elements of due process.").

[21] The language of the 1983 amendment also reflects an intent on the part of Congress to avoid conferring any rights directly upon the tenants. Rather, it imposed on HUD the duty to require each public housing authority to establish a grievance procedure that meets certain criteria. It also mandated that all public housing authorities "utilize leases" which include certain provisions and exclude certain others. 42 U.S.C. § 1437d(k), (*l*) (Supp. II 1984). Thus the amendment did not confer new statutory rights on the tenants themselves. Rather it expanded the rights they derive from their leases. These are the rights at issue in this case—rights that are meant to be adjudicated in local administrative proceedings or state courts.

CONCLUSION

The decision and judgment of the court below should be affirmed.

Respectfully submitted,

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